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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,

Petitioners,

v.

MARION BARRY, JR., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether persons receiving general public assistance benefits are entitled to adequate notice and an opportunity for a pretermination hearing when they are determined to be no longer eligible for benefits on the basis of an application of a change in the benefits eligibility criteria.

PARTIES TO THE PROCEEDING

Petitioners are Bivens Little, Lillie E. Mabry, Francis Hall, and a class of persons consisting of all District of Columbia residents whose General Public Assistance benefits were terminated on or after July 1, 1991, on the ground that they were found not to be disabled but who were not provided a pretermination hearing or informed of the basis of the nondisability finding. Petitioners were the appellees/cross-appellants in the District of Columbia Court of Appeals.

Respondents are Marion Barry, Jr., the Mayor of the District of Columbia; Wayne Casey, the Interim Director of the District of Columbia Department of Human Services; John Bayne, the Administrator of the Income Maintenance Administration of the Department of Human Services; and the District of Columbia. Respondents were the appellants/cross-appellees in the Court of Appeals, which substituted the respondent officials for their predecessors in office.

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PETITION FOR A WRIT OF CERTIORARI

Bivens Little, Lillie E. Mabry, and Francis Hall, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 669 A.2d 115 and is reprinted in the appendix hereto ("App.") at 1a. The pertinent opinions of the Superior Court of the District of Columbia are unreported and are reprinted at App. 28a and App. 69a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1995. The Court of Appeals denied a

timely petition for rehearing or rehearing en banc on July 3, 1996. App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The provisions of D.C. Code §§ 3-205.42, 3-205.42a, and 3-205.53 (Repl. 1994) are reproduced at App. 101a.

INTRODUCTION

In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), this Court held that recipients of welfare benefits are entitled, as a matter of due process, to adequate notice and an opportunity for a hearing before the termination of such benefits. The question in this case is whether the requirements of *Goldberg* obtain when the government modifies the substantive criteria governing such recipients' eligibility for benefits and applies the revised criteria in its determinations of continuing eligibility. The court below held that, after the District of Columbia tightened the eligibility standards for its welfare program, those persons who had been receiving benefits under the preexisting standards were not entitled to constitutionally adequate notice or a hearing prior to the termination of their benefits as a result of the application of the new standards. The court reached this conclusion on the theory that such persons had no protectable property interest in the continued receipt of benefits following the change in the law.

Not only does the decision below conflict with this Court's precedents and with a number of federal and state court decisions, but the question presented in this case has never been more important than it is today, when Congress and state legislatures are actively en-

gaged in the overhaul of welfare programs. As governments continue to reshape, retailor, and revamp their benefits schemes, issues of the sort presented in this case can be expected to arise frequently, implicating the fundamental constitutional rights of some of the Nation's neediest citizens. Review of the erroneous decision of the court below is therefore clearly warranted.

STATEMENT OF THE CASE

A. The District of Columbia's General Public Assistance Law Prior to July 1991

The District of Columbia ("the District") has long provided General Public Assistance ("GPA") benefits to its needy adult residents who, for medical reasons, are unable to support themselves. *See* D.C. Code § 3-202.1(3) (Repl. 1994)[1]; App. 31a. The program is administered by the District's Department of Human Services ("DHS").

Prior to July 1991, the District provided GPA benefits to two categories of persons, the incapacitated and the disabled.[2] Once determined by DHS to be incapacitated or disabled, a person could receive benefits under the

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[1] In keeping with the practice of the Court of Appeals (App. 2a n.3), citations to current provisions of the D.C. Code are followed by "(Repl. 1994)" and superseded provisions are cited without reference to date. The superseded provisions cited herein can be found in Volume 3 of the D.C. Code (Repl. 1988).

[2] Incapacity was defined as "a physical or mental defect, illness or impairment * * * supported by competent medical testimony and * * * of such a debilitating nature as to reduce substantially or eliminate the ability of the applicant or recipient to care for or support himself or herself and * * * expected to last for a period of at least 30 days." D.C. Code § 3-205.42(1)(B). Disability was defined as an inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* § 3-205.42(2).

District's GPA program for a period (known as a "certification period") of up to six months in the case of incapacity and 12 months in the case of disability. *Id.* § 3-205.53(b). Prior to the end of a certification period, DHS was required to notify a benefits recipient that he could "reapply for an extension of the period of payment" by submitting a request for continued assistance and a new medical report. *Id.* § 3-205.53(c). A recipient who timely reapplied was entitled to continue receiving benefits, without interruption, during the reapplication process and to a face-to-face hearing at which he could be represented by counsel prior to DHS' final decision. *Id.* § 3-205.59.

The recertification process permitted recipients to receive benefits continuously over a long period of time. Thus, for example, class representative Lillie Mabry received benefits based on incapacity from November 1983 until she was deemed ineligible for GPA in September 1991 due to D.C. Law 9-27. During that time, Mabry was recertified for 16 separate six-month periods. R. 587-602.

B. D.C. Law 9-27

D.C. Law 9-27, which took effect on July 1, 1991, altered the District's GPA program in several material respects. First, it eliminated eligibility for benefits based on incapacity. D.C. Code § 3-205.42a(a) (Repl. 1994). Second, it provided that a person would be eligible for benefits based on disability if DHS determined him to be disabled "based upon the criteria for the supplemental security income program established pursuant to the Social Security Amendments Act of 1972 (42 U.S.C. § 1381 et seq.)." *Id.* § 3-205.42(2) (Repl. 1994). *See* 42 U.S.C. § 1382c(a)(3) (defining disability for purposes of the supplemental security income ("SSI") program). Thus, as the Superior Court noted, "[t]he new legislation significantly tightened the medical basis of eligibility for general public assistance." App. 29a.

D.C. Law 9-27 provided that anyone receiving GPA benefits as of June 30, 1991, could continue to receive them until the end of his certification period and thereafter could be recertified so long as he was individually "determined to have a disability as defined in § 3-205.42(2) [(Repl. 1994)]." D.C. Code § 3-205.42a(b) (Repl. 1994). Significantly, as the Court of Appeals noted, "unlike the welfare legislation in effect prior to July 1, 1991, [D.C. Law 9-27] provided that GPA benefits would not be continued during the appeal of a termination of benefits based on a finding that the recipient is not disabled." App. 5a. *See* D.C. Code § 3-205.53(c) (Repl. 1994) (last sentence). The combined effect of these provisions was that those persons who were receiving GPA benefits prior to the adoption of D.C. Law 9-27 and reapplied for benefits at the end of their certification periods had no right under the statute to a hearing prior to the termination of their benefits if DHS determined that they did not meet the revised eligibility criteria.

C. The District's Implementation of D.C. Law 9-27

Following the enactment of D.C. Law 9-27, DHS did not inform GPA recipients or their physicians that a new medical standard was in effect until after it had terminated the benefits of numerous recipients. App. 37a. Instead, exhibiting what the Court of Appeals was impelled to call "a deplorable lack of sensitivity * * * toward the population it serves," DHS merely posted notices in its offices regarding the effect of D.C. Law 9-27. *Id.* at 19a n.20. Thus, as the Superior Court found, the "modification to the existing GPA program was imposed totally by surprise upon the recipients" and "[m]ost, if not all, recipients were unaware of the change in the law." *Id.* at 52a, 37a.

In the summer of 1991, following the adoption of D.C. Law 9-27, the first wave of certification periods of persons receiving GPA benefits began to expire. DHS set about making its individualized benefits eligibility

determinations using, as the Superior Court found, "the very same recertification process that had been operational in the past." *Id.* at 36a-37a. As it had before, DHS informed each benefits recipient that his or her current certification period was about to end and that to continue to receive benefits he or she was required to complete and return certain enclosed forms. *Id.* at 16a. Those forms—one to be completed by the recipient and another by his physician—were "[e]xactly the same forms" as those that had been used in the past. *Id.* at 37a. Submitted forms were reviewed by a DHS medical review team ("MRT") on a case by case basis. *Id.* at 16a. If an MRT determined that a specific recipient was not disabled, that recipient was sent a "notice of action" informing him that his benefits would be "terminated." *Id.* at 36a; Hicks Dep. Ex. 5.

These termination notices stated only that the individual recipient had been found to be not disabled and did not disclose the specific basis of the nondisability findings. App. 9a, 18a.[3] The notices also contained flatly contradictory information about the availability of benefits pending appeal, stating both that such benefits were, and were not, available; this error was not corrected until mid-November 1991. *Id.* at 38a.[4] No one

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[3] The notices stated in capital letters: "Your monthly public assistance will be terminated. The reason for this termination is because based on the medical information you provided you were not determined to be disabled." App. 18a; Hicks Dep. Ex. 5.

[4] The notices stated in capital letters: "If you are not satisfied with this action, you may within 15 days from the date of this notice request a hearing. Your benefits will not be continued beyond the effective date of termination if the sole basis for the appeal is your failure to meet disability standards." Directly below this language, the notices stated, again in capital letters, but also underscored by asterisks and with a space between each letter: "Very important read the message below carefully." Below that the notices advised that the reader had a right to a hearing and that "[i]f you make a timely request for a hearing your

whose benefits were terminated on the basis of a nondisability finding was given the opportunity for a hearing prior to the cessation of benefits. *Id.*

There can be no doubt that numerous benefits terminations made pursuant to D.C. Law 9-27 were erroneous. Each of the class representatives, after losing his or her GPA benefits for allegedly not being disabled, subsequently qualified for disability benefits under the federal SSI program—the eligibility criteria for which D.C. Law 9-27 makes applicable to the District's GPA program. R. 343. And the Superior Court found that another plaintiff, who was deemed not disabled despite having submitted to DHS two reports from his physician which "clearly indicate that he is disabled," "appears to be the victim of a baseless denial of benefits." App. 48a, 49a. Thus, the court found that there was "a very real danger confronting many other plaintiffs * * * of unfounded and unjustified adjudications." *Id.* at 48a-49a.

D. The Superior Court Decisions

Petitioners brought suit in the Superior Court of the District of Columbia alleging that they had been denied due process in violation of the Fifth Amendment. As the court noted, "[a]ll of the plaintiffs are persons who were terminated from GPA benefits without any hearing and without an adequate notice as to the specific basis of the administrative finding of non-eligibility under the new law." *Id.* at 70a.[5]

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benefits will continue until a hearing decision is rendered." App. 81a-82a; Hicks Dep. Ex. 5.

[5] The Superior Court certified the case as a class action, the class consisting of "all District of Columbia residents whose benefits were terminated on or after July 1, 1991 on the ground that such persons were found by the Department of Human Services not to be 'disabled' and whose benefits were terminated without a hearing and without a specific notice as to the actual basis for the administrative finding." App. 29a. The Superior Court later clarified that "this litigation does not concern those

The Superior Court rendered its decision on the merits in two opinions handed down on March 9, 1992, and September 8, 1992, accompanying, respectively, the court's issuance of a preliminary and permanent injunction. *Id.* at 28a, 69a. Relying on *Goldberg* v. *Kelly* and subsequent cases, the court held that DHS' termination of petitioners' GPA benefits without the opportunity for a pretermination hearing violated the Due Process Clause of the Fifth Amendment and declared the last sentence of D.C. Code § 3-205.53(c) (Repl. 1994) to be facially unconstitutional insofar as it mandated that result. App. 43a, 76a.

The Superior Court also held that the termination notices sent to the plaintiff class contained "myriad constitutional deficiencies." *Id.* at 80a. As the court found, "these notices all were composed of identical, boilerplate language" and "were devoid of any simple and practical information about the basis for the individual terminations." *Id.* at 35a, 81a. The court also ruled that the notices were "grossly misleading on a most important aspect." *Id.* at 81a. Specifically, they incoherently said that benefits pending appeal both were and were not available and, moreover, were written "in such a way as to emphasize the plainly inaccurate version." *Id.* The court stated that the "lack of individual termination reasons and the internally misleading language are two unrelated deficiencies" and that "either of these deficiencies standing alone is sufficient to render the notices unconstitutional." *Id.* at 82a.

E. The Court of Appeals Decision

The District of Columbia Court of Appeals reversed. It concluded that petitioners had no right to due process—and hence no right to adequate notice or a pretermination hearing—because they "possessed no 'property

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persons who were brand new applicants for benefits in the post-July 1, 1991 era." *Id.* at 30a.

interest' in the continued receipt of GPA benefits extending beyond the expiration of their current certification period following the enactment of D.C. Law 9-27." *Id.* at 4a. When their certification periods expired, the court said, "these hold-over recipients had no 'right' to continued benefits and stood under the statute in virtually the same posture as first-time applicants." *Id.* at 15a.

Petitioners had argued that their property interest derived from the fact that the District's GPA program, like those programs at issue in *Goldberg*, established statutory standards defining eligibility for continued receipt of benefits. *See Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972). The court disagreed, however, saying that "[w]hat this argument overlooks is that, after June 30, 1991, the members of plaintiff class did *not* meet the medical eligibility standard." *Id.* at 10a. The court also rejected petitioners' argument, based upon *Perry* v. *Sindermann*, 408 U.S. 593 (1972), that the District's *implementation* of D.C. Law 9-27 gave rise to a property interest. The court reasoned that under D.C. Law 9-27, "once the hold-over recipient's current certification period ended there was no right to continued benefits unless the recipient met the new disability standard" and that therefore petitioners could not "have had any legitimate expectation that benefits would continue beyond that period—whatever may have been the conduct of, or forms used by, DHS during the recertification process." App. 18a.

With respect to the adequacy of the termination notices, the court reasoned that, because petitioners lacked any protectable property interest, there was "no *constitutional* deficiency in the termination notices." *Id.* at 4a. The court accepted, however, the District's concession that the notices were inadequate under District of Columbia law. *Id.* at 19a. The District had actually conceded that the notices were constitutionally inadequate but the court viewed that concession as inconsistent with

its holding that petitioners lacked a property interest. *Id.* at 19a n.21.

Petitioners filed a petition for rehearing or rehearing en banc, arguing that the Court of Appeals decision was not only contrary to this Court's precedents but also "in direct conflict with the recent decisions of courts in other jurisdictions." Reh'g Pet. 5. The court denied the petition in an order reflecting that Judges Ferren and Farrell would have granted rehearing en banc. App. 26a-27a.

REASONS FOR GRANTING THE WRIT

The decision of the District of Columbia Court of Appeals clearly warrants review by this Court. Its conclusion that petitioners had no property interest in continuing to receive benefits not only is contrary to this Court's decisions but also conflicts with a number of decisions of the United States Courts of Appeals and state supreme courts. The issue in this case, moreover, is an extremely important one involving the basic rights of the poor and one which promises to become even more important in light of the current welfare reform movement.

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONERS HAD NO PROPERTY INTEREST IN THE CONTINUED RECEIPT OF BENEFITS IS SQUARELY AT ODDS WITH THIS COURT'S PRECEDENTS INTERPRETING THE DUE PROCESS CLAUSE.

The Court of Appeals held that those needy District of Columbia residents who had been receiving public assistance prior to D.C. Law 9-27 had no right to a hearing prior to termination of their benefits, because their property interest in receiving such benefits evaporated at the end of their last certification period commencing before the enactment of that law. That view flies in the face of a quarter century of precedent interpreting the Due Process Clauses, starting with *Goldberg* v. *Kelly*,

397 U.S. 254 (1970). Under this Court's cases, the decision below should not be allowed to stand.

In *Goldberg*, as this Court explained in a subsequent case, it was held that "a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process." *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972). This was so even though "[t]he recipients had not yet shown that they were, in fact, within the statutory terms of eligibility." *Id.* at 577.

In the court below, petitioners argued that, like the benefits recipients in *Goldberg*, they had a protectable interest because they had been receiving GPA benefits under statutory standards defining eligibility for those benefits and because they were entitled to continue receiving benefits as long as they continued to meet the eligibility criteria. The Court of Appeals rejected this argument, saying that "[w]hat this argument overlooks is that, after June 30, 1991, the members of plaintiff class did *not* meet the medical eligibility standard. It had been changed by [D.C. Law 9-27]." App. 10a.

But the Court of Appeals overlooked the fact that a property interest in continued benefits can—and often does—arise *prior* to the determination of one's eligibility for them. That was established in *Goldberg*. Thus, to say, as the Court of Appeals did, that petitioners had no right to a hearing because they had no right to benefits simply puts the cart before the horse. "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972). Moreover, the Court of Appeals cannot know that petitioners "did *not* meet eligibility standard," because they were not given a fair opportunity to prove that they did. As noted above, each of the class representatives, after being told by the District that they were not disabled, subsequently qualified for SSI disability benefits and another plaintiff

appeared to the Superior Court to be "the victim of a baseless denial of benefits." App. 49a. The Due Process Clause entitles benefits recipients to a pretermination hearing precisely so that they might show that they continue to be eligible for benefits, whether or not the eligibility criteria have been changed.

The Court of Appeals attempted to distinguish *Goldberg* on the ground that

> this case does not involve an ongoing statutory entitlement of indefinite duration cut short by administrative action. Rather, it involves a transitional statutory entitlement granted to a limited class of persons for a limited period of time. Because D.C. Law 9-27 expressly limited plaintiffs' entitlement to benefits to a specific period of time, namely, their current "certification period," plaintiffs had no property interest extending beyond that period of time. [App. 11a-12a (footnote omitted).]

In fact, D.C. Law 9-27 did not "expressly limit[]" petitioners right to receive benefits to a certification period. On the contrary, the law expressly gives benefits recipients the right to seek continuation of benefits every time a certification period ends. *See* D.C. Code § 3-205.53(c) (Repl. 1994) (after a certification period, a person receiving GPA "may reapply for an *extension* of the period of the payment of such GPA") (emphasis added). While certification periods are limited in time, there is no limit to the number of certification periods a recipient can be granted so long as the eligibility requirements are met. Moreover, DHS must notify recipients of their right to seek continuation of benefits 60 days prior to the end of their certification periods and may not terminate benefits until a determination of ineligibility is made. *See id.* Finally, even under D.C. Law 9-27, a recipient whose benefits are terminated after the end of a certification period who establishes eligibility on appeal is entitled to retroactive benefits for the period of nonpayment. *See id.* § 3-208.1(a) (Repl. 1994).

Taken together, these provisions of the District's GPA law create in benefits recipients a "legitimate claim of entitlement" to benefits even after the expiration of a certification period. *Board of Regents* v. *Roth*, 408 U.S. at 564. This Court made clear in *Roth* that such a legitimate claim constitutes a property interest protected by the Due Process Clause. Therefore, like the welfare recipients in *Goldberg*, petitioners' "claim of entitlement to welfare benefits * * * [is] grounded in the statute defining eligibility for them." *Id.*

Petitioners' case thus stands in sharp relief to that of the college professor in *Roth*, where this Court held that the professor had no property interest in retaining his job beyond the duration of his contract of employment. There, the professor had "absolutely no possible claim of entitlement to re-employment" because he had been hired for a fixed term to end on a date certain and the parties "made no provision for renewal whatsoever." *Id.* at 578. Here, in contrast, GPA is not provided as a mere discrete benefit of finite duration but rather the statute expressly contemplates renewal of benefits so long as eligibility continues.

The Court of Appeals also held that a GPA recipient had no property interest after the end of his certification period because of the new provision of District law prohibiting payment of benefits pending appeal of a noneligibility determination. *See* D.C. Code § 3-205.53(c) (Repl. 1994) (last sentence). In so doing, the Court of Appeals has revived the "bitter with the sweet" approach to due process which this Court has squarely rejected. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985).[6] Under that discredited approach, the

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6 "[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance

source of a property interest (such as state law) can also define the procedure for its revocation. Section 3-205.53(c) cannot, however, circumscribe the procedures constitutionally mandated by the Due Process Clause.

The Court of Appeals sought to circumvent *Loudermill* by characterizing certification periods as a "substantive limitation" upon the right to receive benefits. App. 12a. A certification period, however, is merely a procedural device for facilitating the orderly and timely determination of a benefits recipient's continuing eligibility. It is not an insuperable barrier to the receipt of continued benefits. Indeed, as noted above, D.C. Law 9-27 expressly contemplates that benefits will continue beyond the end of the certification period so long as eligibility continues. Under the Court of Appeals' approach, however, it is possible to defeat a benefits recipient's property interest in continued benefits—and hence the government's duty to provide a pretermination hearing—with the simple imposition of numerous "certification periods" or other procedural checkpoints. If *Goldberg* is so easily circumvented, it is meaningless. *Cf. Lyons* v. *Weinberger*, 376 F. Supp. 248, 260 (S.D.N.Y. 1974) ("A state would not be permitted to evade the requirements of *Goldberg* v. *Kelly* simply by transferring its public assistance programs to a new agency and, then, labeling terminations of welfare payments determinations of initial entitlement.").

Prior to the adoption of D.C. Law 9-27, to qualify for the District's GPA program it was necessary to (1) be over the age of 18; (2) be a District resident; (3) be financially needy; (4) satisfy the medical eligibility criteria. App. 10a. That is still the law. All that the District did was modify the last criterion by replacing

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and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Loudermill*, 470 U.S. at 541.

the existing definitions of incapacity and disability with a single new definition of disability. Therefore, it is simply wrong to say, as the Court of Appeals did, that "this case does not involve an ongoing statutory entitlement." *Id.* at 11a.

Finally, even if the District's statutes did not give rise to a property interest on the part of petitioners, such an interest was created by the manner in which D.C. Law 9-27 was *implemented*. The District's administration of its GPA program following the enactment of D.C. Law 9-27 was identical to its prior procedure. It used the very same recertification forms that it had used before and did not inform GPA recipients or their physicians during the recertification process that a new medical eligibility standard was in effect. Under these circumstances, petitioners had every reason to believe that if their medical conditions had not improved, and if they filled out their forms the same way, they would continue to receive benefits. Petitioners' belief, even if wrong, was sufficiently reasonable to give rise to a property interest entitling them to due process. *Cf. Perry* v. *Sindermann*, 408 U.S. 593 (1972).

In sum, the Court of Appeals' decision is contrary to some of the landmark cases decided by this Court construing the Due Process Clause, including *Goldberg* v. *Kelly*, *Loudermill*, and *Perry* v. *Sindermann*. For that reason alone, review of the decision below is plainly warranted.

II. THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND STATE SUPREME COURTS.

The Court of Appeals' holding that petitioners were not denied due process also conflicts with a number of decisions of both the United States Courts of Appeals and state supreme courts. The conflict and confusion in the lower courts is exacerbated by the fact that some

other federal and state cases support the decision below. This conflict and confusion indicates that the lower courts are in need of guidance as to the proper application of *Goldberg* and this Court's other due process precedents in circumstances such as those here.

To begin with, by concluding that petitioners had no property interest in the continued receipt of GPA benefits because "the medical eligibility standard * * * had been changed" (App. 10a), the court below brought itself into direct conflict with two very recent circuit court decisions. *See Greene* v. *Babbitt*, 64 F.3d 1266 (9th Cir. 1995); *Youakim* v. *McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2571 (1996). *See also Hill* v. *O'Bannon*, 554 F. Supp. 190 (E.D. Pa. 1982).

In *Greene*, individual members of an Indian tribe lost benefits under various federal entitlement programs for Indians due to a change in federal law conditioning the eligibility for such programs on the tribe's being recognized by the United States. The decision to deny recognition to the tribe was made without a hearing. The government argued that the Indians had "not proved that they have been deprived of any property interests protected by the Due Process Clause," 64 F.3d at 1271, but the Ninth Circuit disagreed.

Reaching a conclusion directly contrary to that reached by the Court of Appeals in this case, the *Greene* court held that "once Congress has narrowed eligibility for fundamental health and welfare benefits by conditioning eligibility on tribal recognition, the due process clause requires a meaningful hearing to determine whether those previously eligible can meet the new and narrowed requirements." *Id.* at 1273. The Ninth Circuit added that "[t]he protections of the Fifth Amendment would be seriously impaired if this court allowed the government to cut off benefits without a hearing by creating new eligibility requirements and then summarily holding that current benefit recipients do not meet the new requirements." *Id.* The court concluded that "[t]o hold other-

wise would be to sanction possibly arbitrary and unjustified elimination of individual property interests in contravention of the settled principle first recognized in *Goldberg* v. *Kelly*, that entitlement to fundamental benefits represents a property interest implicating the protection of the due process clause." *Id.*

Similarly, in *Youakim*, certain foster children had their benefits terminated when Illinois reformed the licensing requirements for foster care homes ("HMR reform"). The Seventh Circuit rejected Illinois' contention that the children lacked a protectable interest in the benefits "because they have no legitimate claim of entitlement to foster care benefits after the effective date of HMR reform." 71 F.3d at 1288.[7] In so doing, the Seventh Circuit expressly followed the Ninth Circuit in *Greene*:

> We find the circumstances here to be virtually indistinguishable from those in *Greene*. The plaintiffs here, like the individual Samish Tribe members in *Greene*, were receiving government benefits prior to a legislative change that imposed a new eligibility requirement. The effect of that change, both here and in *Greene*, was to eliminate (at least temporarily) the benefits of current recipients while they attempted to satisfy the new requirement. Although the Illinois General Assembly was as free as Con-

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[7] Illinois' argument in *Youakim* was identical to the argument of the District accepted by the Court of Appeals in this case:

> The Director does not contest that plaintiffs had a legitimate claim of entitlement to foster care benefits under Illinois law prior to the implementation of HMR Reform. He maintains, rather, that their interest cannot be judged under prior law, but only as of the July 1, 1995, effective date of the reforms. The Director argues that because the plaintiff children reside in homes that currently are unlicensed, they lack a legitimate claim of entitlement to foster care benefits under HMR Reform. Effectively, then, the Director is arguing that plaintiffs lack a protectable property interest because the State of Illinois eliminated any entitlement they may have had when it reformed its foster care system. [71 F.3d at 1288-89.]

> gress to alter its benefit program by adding a new eligibility requirement, we agree with the Ninth Circuit that the Due Process Clause does not permit the State to withhold benefits without determining whether current recipients can meet the new requirement. *See Greene*, 64 F.3d at 1273. Just as the individual Tribe members in *Greene* were entitled to a hearing on the federal recognition question before the government could eliminate their benefits, plaintiffs here are entitled to [an agency] determination on the licensing question before the Director may deprive them of foster care benefits. [71 F.3d at 1291.]

Contradicting the view of the court below, the Seventh Circuit held that "due process requires that the governmental agency provide current recipients the opportunity to establish eligibility under the new standards *before* their benefits may be eliminated." *Id. See also Hill* v. *O'Bannon*, 554 F. Supp. at 194 (benefits recipients had property interest despite law which "amended the eligibility criteria of the existing welfare code regarding continued entitlement to benefits").

Furthermore, the ruling below that petitioners had no property interest because they "did *not* meet the medical eligibility standard" (App. 10a) conflicts with another recent circuit court case, *Mallette* v. *Arlington County Employees' Supp. Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996). There, employing the same reasoning used by the court below, Arlington County, Virginia argued that "because Mallette may not receive benefits unless she meets the eligibility requirements, and because the Board determined that Mallette did not meet those requirements, Mallette has no property interest in the benefits." *Id.* at 637. The Fourth Circuit, however, rejected that argument because it

> confuses the right to receive a benefit with the right to fair decision-making before the benefit is denied. Under the County's approach, any adverse decision on the merits would insulate it from the obligation to

> provide due process. Conversely, no employee could have a property interest triggering due process unless the agency had already awarded them the benefit—a convenient result for the County—but one that conflicts with the law. The Supreme Court has explained that a person may hold a property interest in a benefit even before it is determined that she is, in fact, eligible for the benefit. * * * Just as the plaintiffs in *Goldberg* were not required to show that they would prevail on the merits before they were entitled to due process, Mallette need not prove that her injury meets County standards to rightfully claim a modicum of procedural fairness. We hold that Mallette has a property interest in her *potential* eligibility for disability retirement benefits, whether or not she ultimately prevails on the merits. [*Id.* (emphasis added; citation omitted).]

Similarly, the Seventh Circuit concluded in *Youakim* that the government "may not defend against a due process claim, as the Director does here, by arguing that the plaintiff now lacks a protectable property interest by virtue of the very state action the plaintiff has challenged." 71 F.3d at 1289. Thus, in that case "[t]he fact that the plaintiff children currently reside in homes that are not licensed is not controlling, just as the lack of federal recognition for the Samish Tribe did not control the analysis is *Greene*." *Id.* at 1291.

The holding below that when petitioners' certification periods expired following the enactment of D.C. Law 9-27 "these hold-over recipients had no 'right' to continued benefits and stood under the statute in virtually the same posture as first time applicants" (App. 15a) is also contrary to the unanimous decisions of four circuits in an analogous context: the displacement of state disability programs by the federal SSI program. *See Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Brown* v. *Weinberger*, 529 F.2d 514 (4th Cir. 1975), *aff'g without*

opinion, 382 F. Supp. 1092 (D. Md. 1974); *Ryan* v. *Shea*, 525 F.2d 268 (10th Cir. 1975).

In 1972, Congress amended the Social Security Act to end federal funding of state disability programs and establish instead the SSI disability program. Although new eligibility criteria were promulgated for the SSI program, Congress provided that any person who received state disability benefits during December 1973 *and prior to July 1973* would automatically qualify for SSI benefits to begin in January 1974. Those who received state benefits in December 1973 *but not before July 1973*, however, would receive benefits for three months, at most, until an SSI eligibility determination could be made. Pretermination hearings were not provided to such "rollback recipients" deemed ineligible for the SSI program.

The four courts cited above held that rollback recipients had a property interest in the continued receipt of benefits under the SSI program, and hence that the lack of pretermination hearings violated due process. *See Tatum*, 541 F.2d at 164-165; *Johnson*, 539 F.2d at 1117-20; *Ryan*, 525 F.2d at 272-274; *Brown*, 382 F. Supp. at 1097-1100. Unlike the court below, these courts did not view a rollback recipient's property interest as ending after the transitional benefits period. As the *Tatum* court explained, "[t]he SSI program is essentially a continuation of the prior [state] program, in which the plaintiffs had a property interest * * *. We reject the Secretary's contention that these rollback recipients should be treated as initial SSI applicants with no interest in continuation of benefits." 541 F.2d at 164, 165. *See also Johnson*, 539 F.2d at 1118 & n.8.

In addition, in *Avanzo* v. *Rhode Island Dep't of Human Servs.*, 625 A.2d 208 (R.I. 1993), the Rhode Island Supreme Court reached a decision contrary to the one below on strikingly similar facts. In 1992, Rhode Island adopted "article 46"—a measure which "tightened the eligibility requirements significantly" (*id.* at 209) for its

GPA program by making receipt of benefits contingent upon total, rather than partial, incapacity.[8] Rhode Island sent standardized notices to GPA recipients deemed ineligible for benefits under article 46.

Relying on *Goldberg* v. *Kelly*, the Rhode Island Supreme Court held that the notices--which failed to inform the recipients "of the change of incapacity standards or the manner in which they failed to meet such standards"—violated due process. *Id.* at 211. Going further, the court also concluded that "[t]he lack of individualized notice rendered hearings on the part of the recipients who requested hearings less than meaningful" since such recipients "were unaware of the change of standards and most particularly were unaware of the manner in which they failed to meet such standards." *Id.* Accordingly, the court held that "the GPA recipients whose benefits were terminated pursuant [to article 46 were] * * * deprived of a meaningful opportunity to be heard prior to the termination of their benefits." *Id.*

The decision below also conflicts with still other State Supreme Court decisions. *See Harkless* v. *Rowe*, 657 A.2d 562, 572-573 (Conn. 1995) (holding that recipients of general assistance benefits had a property interest in the possibility of receiving a three-month extension of benefits); *In re Diel*, 614 A.2d 1223, 1226 (Vt. 1992) (holding that Department of Social Welfare's recission of policy change that would have increased Aid to Needy Families with Children benefits—"implemented unilaterally" and without notice—violated due process).

To the extent that the Court of Appeals' decision rests on the view that first-time applicants for welfare benefits

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[8] "Under the prior standards a partial incapacity that made the applicant unable to maintain full-time employment would qualify the applicant for certain benefits. Under article 46 the incapacity requirement was raised to total incapacity that made the applicant unable to engage in either full or part-time employment." *Avanzo*, 625 A.2d at 209.

(as opposed to persons already receiving such benefits) have no property interest—and thus no right to due process—its decision is in conflict with apparently "every lower federal court that has considered the issue." *Mallette*, 91 F.3d at 638. In *Mallette*, the Fourth Circuit held that "[w]e join our sister courts in rejecting the mechanical and simplistic applicant/recipient distinction where a statute mandates the payment of benefits to eligible applicants based on objective, particularized criteria." *Id.* at 639-640 (citing cases from six other circuits and several districts courts).[9]

Adding further to the conflict described above, other federal and state cases *support* the decision below. The Court of Appeals relied (App. 12a-13a) on the decisions of two circuits involving the Food Stamp Program. *See Banks* v. *Block*, 700 F.2d 292 (6th Cir.), *cert. denied*, 464 U.S. 934 (1983); *Holman* v. *Block*, 823 F.2d 56 (4th Cir. 1987); *Jackson* v. *Jackson*, 857 F.2d 951 (4th Cir. 1988). In the leading case, the Sixth Circuit held that "a household has no protectable property interest in the continuous entitlement to food stamps beyond the expiration of its certification period." *Banks*, 700 F.2d at 297. The *Banks* court reasoned that "[u]nder the Food Stamp Program it appears that the certification period of eligibility * * * establishes no property interest beyond the term of the assigned period. * * * [T]hose seeking recertification for food stamps are treated essentially like

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[9] The *Mallette* court noted that there is a conflict on the issue since there are "state cases reaching the contrary conclusion." 91 F.3d at 639 (citing cases from California, Maine, and New York courts). The court also noted that "[w]hether an applicant for benefits is entitled to the same process as a recipient whose benefits are revoked is a thread expressly left loose by the Supreme Court." *Id.* at 637 (citing *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985); *Gregory* v. *Town of Pittsfield*, 470 U.S. 1018 (1985) (O'Connor, J., dissenting from the denial of certiorari); and *Peer* v. *Griffeth*, 445 U.S. 970 (1980) (Rehnquist, J., dissenting from the denial of certiorari)).

first-time applicants." *Id.* at 297-298. *See also Holman*, 823 F.2d at 59 (following *Banks*); *Jackson*, 857 F.2d at 957 (adhering to *Holman*). *But see Basel* v. *Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (per curiam) (holding that food stamp recipients had a property interest in continued receipt of benefits after the end of their certification period).

Banks was, however, decided before this Court in *Loudermill* settled that a property interest "cannot be defined by the procedures provided for its deprivation." 470 U.S. at 541. In petitioners' view, *Banks* and its progeny were wrongly decided.[10] A benefits recipient has a property interest in the continued receipt of benefits if there exist statutory standards defining eligibility for additional benefits. The use of certification periods to facilitate the process of making determinations of continuing eligibility for benefits cannot defeat that interest.

Finally, in *Saxon* v. *Department of Social Servs.*, 479 N.W.2d 361 (Mich. App.), *appeal denied*, 479 N.W.2d 352 (Mich. 1991), Michigan ceased funding its General Assistance ("GA") program and funded instead a State Disability Assistance ("SDA") program (which, unlike GA, was to be exclusively disability based). During the transition between the two programs, the state provided supplemental benefits to disabled GA recipients only.

Some GA recipients notified of the imminent cessation of their benefits brought suit challenging the adequacy of the notices. The trial court held the notices violated due process in that they "failed to give adequate notice to former GA recipients of the need to demonstrate disability in order to continue receiving benefits." *Id.* at 365. In so holding, that court concluded that disabled GA recipients had a protectable property interest because "the SDA program is nothing more than a continuation

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10 *Holman* and *Jackson* were decided after *Loudermill* but in both cases the Fourth Circuit relied on *Banks*.

of at least a part of the old GA program, *i.e.*, the part that provided benefits to disabled individuals." *Id.* The trial court rested that conclusion on the facts that "the eligibility requirements for disabled GA recipients were the same as those for the allegedly new SDA program" and that Michigan "treated the programs as though they were the same." *Id.*

The Michigan Court of Appeals reversed, concluding that "SDA is a new program targeting benefits only to those who are disabled, whereas GA made no distinction between the disabled and the able-bodied" and that "[t]he fact that a policy decision was made to provide disabled GA recipients with supplemental benefits does not require a different conclusion." *Id.* at 366-367.[11]

In short, the circuit courts and highest state courts are divided on the important issue decided by the court below. Moreover, as next discussed, that issue has become even more important as the welfare reform movement has grown and as more and more jurisdictions alter their welfare eligibility criteria.

III. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE MADE EVEN MORE IMPORTANT BY THE CURRENT WELFARE REFORM MOVEMENT.

There can be no doubt that, by any measure, the issue in this case is sufficiently important to warrant review of the decision below. That decision implicates the fundamental constitutional rights of some of the neediest citizens of the federal district which houses the principal institutions of our National Government, including this

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[11] Although the trial court's decision was based on the Due Process Clause of the Michigan Constitution, the Michigan Court of Appeals construed that clause to be the same as its federal counterpart and expressly undertook a "due process analysis under federal precedent." 479 N.W.2d at 366.

Court. But the importance of this case does not end there.

Even a casual observer of American public policy and politics cannot have failed to notice the sweeping welfare reform movement taking place at both the state and federal level. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) ("the 1996 Welfare Act") (restricting various entitlements); *Moore* v. *Ganim*, 660 A.2d 742 (Conn. 1995) (involving challenge to state law ending state welfare benefits after nine months); Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 Am. U. L. Rev. 1111, 1113 (1996) (noting that "recent welfare reform measures * * * reduce benefits and tighten eligibility requirements"). In the 1996 Welfare Act, for example, Congress defined childhood disability for purposes of the SSI program, § 211; restricted the eligibility of certain aliens for federal, state, and local benefits programs, §§ 401-403, 411-412; and made numerous eligibility- and benefits-related changes to the Food Stamp program, §§ 801-856.[12] And as this case illustrates (as do *Youakim*, *Avanzo*, and *Saxon*), the States too are restricting the eligibility criteria for their

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[12] The central feature of the 1996 Welfare Act is the federal funding of state benefits programs through the provision of block grants. *See* § 103 of the Act. It is noteworthy that, to qualify for such grants, the Act requires States to submit a written plan which, among other things, must "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, *including an explanation of how the State will provide opportunity for recipients who have been adversely affected to be heard in a State administrative or appeal process*." *Id.* § 103(a)(1) (to be codified at 42 U.S.C. § 402(a)(1)(B)(iii)) (emphasis added). Thus, in the 1996 Welfare Act, Congress recognized what the court below did not—*i.e.*, that benefits recipients must receive an opportunity for a hearing if an adverse benefits determination is to be made.

benefits programs. Accordingly, the central question decided by the Court of Appeals in this case—whether welfare recipients are entitled to a hearing prior to the termination of their benefits for failure to meet revised eligibility standards—will surely be of continuing importance. Because of that importance, because of the divisions in the lower courts over the issue, and because the decision in this case directly conflicts with this Court's precedents, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Judgment Entered December 18, 1995]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 92-CV-1157
No. 92-CV-1448

MARION BARRY, JR., *et al.*, Appellants/Cross-Appellees,

v.

BIVENS LITTLE, *et al.*, Appellees/Cross-Appellants.

Appeals from the Superior Court of the
District of Columbia

(Hon. Cheryl M. Long, Trial Judge)

(Argued December 8, 1994
Decided December 18, 1995)

Karen L. McDonald, Assistant Corporation Counsel with whom *Vanessa Ruiz*, Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel were on the brief, for appellants/cross-appellees.

John G. Roberts, Jr., with whom *Walter A. Smith, Jr.*, *John C. Keeney, Jr.*, *L. Anthony Sutin*, *Adam H. Charnes*, *Lynn E. Cunningham*, *Robert Berlow*, *Patricia Mullahy Fugere*, *Frank R. Trinity*, *Joan D. Christopher*, *Faith Mullen* and *Arthur B. Spitzer* were on the brief, for appellees/cross-appellants.

Before WAGNER, Chief Judge, and STEADMAN, Associate Judge and BOWERS,* Associate Judge of the Superior Court of the District of Columbia.

BOWERS, *Associate Judge:* Plaintiffs,[1] a class of District of Columbia residents receiving General Public Assistance (GPA) benefits on June 30, 1991 under the Public Assistance Act of 1982, D.C. Code §§ 3-201 to 3-221.1 (1988 Repl.),[2] suffered the termination of those benefits when they were later found not to be "disabled" under D.C. Law 9-27,[3] originally enacted as emergency legislation, effective July 1, 1991, amending the 1982 statute. These terminations were to become effective at the end of the recipients' current "certification period."[4]

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* Sitting by designation pursuant to D.C. Code § 11-707 (a) (1995).

[1] This case is before the Court on cross appeals. Defendants below are appellants/cross-appellees; plaintiffs below are appellees/cross-appellants. For ease of reference, the trial court designations will be used in this opinion.

[2] The trial court's order of January 29, 1992 certified the class as "all persons residing in the District of Columbia whose general public assistance benefits were terminated on or after July 1, 1991 on the ground that such persons were found by the Department of Human Services not to be 'disabled' and whose benefits were terminated without a hearing and without a specific notice as to the actual basis for the administrative finding."

[3] Omnibus Budget Support Emergency Act of 1991, D.C. Act 9-37 (emergency legislation) and Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991, D.C. Law 9-27 (permanent legislation). In passing the permanent legislation, the D.C. Council simply adopted the language contained in the emergency legislation. D.C. Law 9-27 is now codified at D.C. Code §§ 3-201 to 3-221.1 (1994 Supp.). In this opinion, citations to the pre-amendment statute are provided without a date. Citations to the codification of D.C. Law 9-27 are followed by (1994 Supp.).

[4] Prior to the 1991 amendment to the Public Assistance Act of 1982, a needy adult resident of the District of Columbia could qualify for GPA benefits if he were either incapacitated or disabled. A person was deemed "incapacitated" if he or she had a

The non-disability findings were made without any pre-termination hearings and were followed by termination notices from the Department of Human Services (hereinafter, "DHS") which failed to disclose the basis of such findings. After first seeking administrative "fair hearings," the aggrieved recipients thereafter filed in Superior Court this class action lawsuit, claiming that the notices were violative of D.C. Code § 3-205.55 (1994 Supp.), and that the notices, as well as the final sentence of D.C. Code § 3-205.53(c) (1994 Supp.), precluding the payment of benefits pending appeals from non-disability findings, were violative of the Due Process Clause of the Fifth Amendment. The Superior Court agreed with these contentions, declared D.C. Code § 3-205.53 (c) (1994 Supp.) unconstitutional on its face, granted plaintiffs' motion for partial summary judgment[5] and issued a permanent injunction[6] (a) enjoining the

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physical or mental impairment of such a debilitating nature as to reduce substantially or eliminate that person's ability to support himself or herself, and which was expected to last for a period of at least 30 days. A person was deemed "disabled" however, only if the impairment precluding engagement in gainful activity was expected to result in death or last for a period of not less than 12 months. D.C. Code § 3-205.42. In the absence of a reapplication and new determination of eligibility, payments based on incapacity were limited to a certification period of six months and those based on disability were limited to a certification period of twelve months. D.C. Code § 3-205.53.

[5] One issue, not germane hereto, remains for trial. An order granting partial summary judgment is usually considered a non-appealable interlocutory order in the absence of a certification under Super. Ct. Civ. R. 54 (b). *Cohen v. Owens & Co.*, 464 A.2d 904 (D.C. 1983). However, because injunctive relief was granted pursuant to said judgment, this appeal is properly before us pursuant to D.C. Code § 11-721(a)(2)(A) (1995 Repl.). *See Gomez v. Turner*, 217 U.S. App. D.C. 281, 285, n.5, 672 F.2d 134, 138, n.5 (1982); *Roth v. Board of Regents*, 446 F.2d 806, 807 (7th Cir. 1971) (rev'd on other grounds, 408 U.S. 564 (1972)); *Ortiz v. Eichler*, 794 F.2d 889, 891 (3rd Cir. 1986).

[6] A preliminary injunction awarding similar relief to plaintiff class had earlier been issued.

District of Columbia[7] from terminating GPA benefits of any class member without providing such person with adequate notice and the opportunity for a pre-termination hearing and (b) ordering reinstatement of benefits and retroactive payments from date of termination to date of reinstatement. The District appeals from these rulings. The lower court, however, refused to reinstate the benefits of a sub-group of plaintiff class who re-applied for benefits but failed to appeal the denials of their re-applications. Their appeal of that refusal constitutes the cross-appeal.

Because we conclude that plaintiffs possessed no "property interest" in the continued receipt of GPA benefits extending beyond the expiration of their current certification period following enactment of D.C. Law 9-27, we reverse the trial court's judgment declaring unconstitutional D.C. Code § 3-205.53(c) (1994 Supp.). For the same reason, we find no *constitutional* deficiency in the termination notices. The District concedes, however, that said notices were violative of D.C. Code § 3-205.55 (1994 Supp.) and hence, for that reason, does not challenge the order of the trial court requiring reinstatement of benefits. The order awarding a lump-sum retroactive payment, however, is challenged on appeal as an unwarranted exercise of the trial court's equitable powers in fashioning a remedy. We agree and reverse that order.

Because we find no abuse of discretion in the trial court's decision not to grant any relief to those members of plaintiff class who failed to appeal the denials of their

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[7] In addition to the District, the remaining named defendants at the time the complaint herein was filed were Sharon Pratt Kelly, Mayor; Vincent Gray, Director, Department of Human Services and James Butts, Administrator, Income Maintenance Administration, Department of Human Services. Their successors in office have now been substituted in their stead, pursuant to D.C. App. Rule 43 (c). The defendants shall all hereinafter be referred to collectively as "the District."

reapplications for GPA benefits, we affirm its ruling challenged on cross-appeal.

I.

D.C. Law 9-27 and its Legislative History

In the spring of 1991, at the urging of the Mayor due to severe budgetary constraints, the D.C. Council passed emergency legislation (made permanent by D.C. Law 9-27), effective July 1, 1991, which substantially altered the GPA program in several respects. First, it eliminated "incapacity" as a ground for the receipt of GPA benefits. Second, it changed the substantive definition of "disability." Under the new standard, an individual "shall be deemed to be disabled if the individual is determined by the Mayor to be disabled based upon the criteria for the supplemental security income program established pursuant to the Social Security Amendments Act of 1972 (42 U.S.C. § 1381 *et. seq.*)." D.C. Code § 3-205.42 (1994 Supp.).[8] Third, unlike the welfare legislation in effect prior to July 1, 1991, it provided that GPA benefits would not be continued during the appeal of a termination of benefits based on a finding that the recipient is not disabled. Lastly, of pivotal significance to the outcome of the instant appeal, it added to the pre-existing statute an entirely new section, now codified at D.C. Code § 3-205.42a (1994 Supp.), captioned "Eligibility for General Public Assistance." This new section reads as follows:

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[8] Under the federal Supplemental Security Income (SSI) program, an individual is considered disabled only if his physical or mental impairment is of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B). Under implementing regulations, a five-step sequential evaluation process is utilized for determining whether a claimant is disabled. 20 C.F.R. § 416.920 (1995). This process if fully explained in *Pagan v. Bowen*, 274 U.S. App. D.C. 113, 862 F.2d 340 (1989).

> (a) Except as provided in subsection (b) of this section, beginning July 1, 1991, an individual shall be eligible for GPA benefits only if the individual has a disability as defined in Section 3-205.42(2).
>
> (b) An individual who is receiving GPA benefits on June 30, 1991, may continue to receive GPA benefits until the expiration of the individual's certification period. Benefits beyond the expiration of the certification period shall not be paid to an individual unless the GPA recipient reapplies for benefits and is determined to have a disability as defined in Sec. 3-205.42(2) . . .[9]

On March 18, 1991, Bill 9-159, the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991 (which ultimately was enacted as D.C. Law 9-27) was introduced in the District of Columbia Council at the request of the Mayor and referred to the Committee on Human Services. On April 25, 1991 this Committee issued a Report, signed by its Chairman, H.R. Crawford (hereinafter, The "Crawford Committee Report"), recommending the Bill's approval by the full Council. In the section of the Report captioned "Background and Need," the Report refers to the Mayor's revised Fiscal Year 1991 and Fiscal Year 1992 budget proposals submitted to the Council to deal with severe budget and financial constraints facing the city brought on by the then-current economic recession. One of the proposals called for "a reduction in spending in various District-

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[9] Interestingly, in the "Section by Section Analysis" segment of the Crawford Committee Report, discussed *infra*, it is stated that "[t]his provision permits individuals currently receiving GPA *under the incapacity provision* to continue to receive those benefits until their recertification period arrives. At that time, the individual must then meet the new criteria to be eligible." (Emphasis added.) Actually, however, in the 1991 Act this temporal limitation literally applies to *all* persons receiving GPA benefits on June 30, 1991, whether on the basis of incapacity or on the basis of the then-definition of disability.

funded programs, including a reduction in the General Public Assistance Program (GPA). . . ." Crawford Committee Report at 2. This reduction in GPA spending was needed to offset increased spending required to adequately fund a growing Aid to Families with Dependent Children (AFDC) caseload. *Id.* at 3. Bill 9-159 sought to accomplish this reduction in GPA spending primarily by repeal of the "incapacity" eligibility criteria. In this same "Background and Need" Section, the Crawford Committee Report made the following observation:

> An individual on GPA receives a payment of $270 per month. During the first 6 months of FY 1991, an average of 4685 persons per month received GPA. Of that number approximately 3,200 had an incapacity (and) 881 were permanently disabled and were applying for SSI. . . . Current estimates are that about 1,500 persons would lose GPA eligibility with the repeal of the incapacity eligibility criteria.

Id. at 5.

Finally, at a Committee meeting held on April 25, 1991 to consider and mark up Bill 9-159, Council Chairman John Wilson, clearly recognizing the detrimental impact that passage of the Bill would have upon many GPA recipients, stated that:

> the present financial situation calls for some hard, unpopular decisions, and . . . this one (the vote on Bill 9-159) is one of the first that the City Council will have to make.

Crawford Committee Report at 19.

II.

Trial Court Statement of Issues and Findings

In a Memorandum Opinion dated September 8, 1992 and issued contemporaneous with the issuance of a Permanent Injunction in favor of plaintiffs, the trial court described the issues before it in these words:

> Lest there be any doubt, this case does not involve a challenge to the legislature's right and power to make changes in eligibility criteria. Rather, the real issue in this case is the lack of a pretermination hearing (denied by statute) and adequate notice of termination to the affected recipients.
>
> The focus of the case is the asserted constitutional deficiency of the manner in which the District of Columbia has implemented 1991 legislation that changes the criteria for these [GPA] benefits. The term "implemented" refers to executive branch action as well as a specific statutory mandate.

Memorandum Opinion at 2.

The statutory mandate referred to above, which the trial court declared unconstitutional on its face, is the final sentence of D.C. Code § 3-205.53(c) (1994 Supp.), which states that "[b]enefits shall not be continued beyond the effective date of termination if the sole basis for the individual's appeal of the termination is the failure to meet the disability standard defined in Sec. 3-205.42."

Among the trial court's Findings of Fact[10] were the following relating to implementation of the 1991 legislation by the Department of Human Services:

> 1. The same recertification forms (one to be executed by the recipient and one by his or her physician) were used as had been used under the pre-1991 legislation.
>
> 2. At no time prior to or during the recertification process did GPA recipients or their doctors receive a

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[10] These Findings of Fact, made by the trial court in its Memorandum Opinion of March 9, 1992, accompanying the issuance of a Preliminary Injunction, were later incorporated by reference into its Opinion of September 8, 1992, accompanying the issuance of a Permanent Injunction.

notice from DHS warning that the person was to be evaluated under the new medical eligibility standard.

3. The termination notices merely stated that the GPA recipient was found not to be disabled, without specifying the underlying basis therefor.

III.

Due Process Analysis

A. Property Interest, if Any, Derived from Provisions of D.C. Law 9-27

We begin by taking note of what this case does *not* involve. In its Memorandum Opinion dated March 9, 1992, accompanying the Preliminary Injunction, the trial judge observed that

> [b]ecause of the nature of the allegations and the status of the plaintiffs as current recipients, this litigation does not concern those persons who were brand new applicants for benefits in the post-July 1, 1991 era.

Further, at oral argument in this court, plaintiffs' counsel stated that the class he represents "does not include people who first became eligible under the new law." When answering an inquiry concerning new applicants under the 1991 legislation, he responded, "I don't represent those persons." Hence, the narrow issue before this Court may be stated thusly: whether those persons receiving GPA benefits on June 30, 1991 who, upon expiration of their current certification periods, were found not "disabled" under D.C. Law 9-27, had a property interest in, and a constitutional right to, the continuation of such benefits pending an administrative "fair hearing." The trial court ruled that they did. We disagree and reverse.

Plaintiffs' counsel, at oral argument, candidly acknowledged that the Council *could* have limited a recipient's entitlement to GPA benefits to a concrete,

finite span of time, such as a year or a "certification period." There can be no doubt that the legislature has the power to define and limit the scope and duration of any entitlement program it creates. *Atkins v. Parker*, 472 U.S. 115, 129 (1985). However, plaintiffs assert that the 1991 legislation, under which they contend their property interest is derived, contained no such limitation.[11] Their argument in support of this proposition is set forth in their Brief as follows, at 14:

> Before the termination, plaintiffs were receiving benefits under statutory standards defining eligibility for those benefits. . . . Entitlement to GPA benefits is determined by satisfying the substantive eligibility criteria specified by District law . . . namely, being over the age of 18, being financially needy, satisfying the residency requirement and *meeting the medical eligibility standard.* A person who satisfied each of these criteria remains under District law, eligible for GPA benefits for an indefinite period, and a recipient who is improperly terminated is entitled to full retroactive benefits.

(Emphasis added.)

What this argument overlooks is that, after June 30, 1991, the members of plaintiff class did *not* meet the medical eligibility standard. It had been changed by D.C. Code § 3-205.42(2) (1994 Supp.), effective July 1, 1991. Because of the city's fiscal crisis, the "incapacity" criteria had been repealed and the "disability" criteria redefined. Moreover, the Council did not leave to conjecture the issue of the duration of benefit entitlement for these pre-July 1, 1991 GPA recipients. By the express language of D.C. Code § 3-205.42a(b) (1994 Supp.), the "grandfather clause" under which these plaintiffs contin-

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[11] At least twice during oral argument, counsel for plaintiff class asserted that their claimed property interest arose under the 1991 legislation (coupled, to be sure, with their status as recipients of benefits under the 1982 Act).

ued to receive payments, their benefits would continue only "until the expiration of the individual's certification period" unless the individual "reapplied" and was found to fall within the new definition of disability.[12] Further, D.C. Code § 3-205.53(c) (1994 Supp.) eliminated the right to continuation of benefits pending administrative appeal of a non-disability determination. Read together, particularly in light of the city's fiscal woes, it is readily apparent that these two statutory provisions were intended by the Council to serve as a substantive temporal limitation upon the GPA entitlement for those persons receiving benefits at the time of enactment of D.C. Law 9-27. Thus, unlike *Goldberg v. Kelly*, 397 U.S. 254 (1970), this case does not involve an ongoing statutory entitlement of indefinite duration cut short by administrative action. Rather, it involves a transitional statutory entitlement granted to a limited class of persons for a limited period of time.[13]

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[12] *See DeLao v. Califano*, 560 F.2d 1384 (9th Cir. 1977) (property interest of "grandfathered" disability recipients is limited to the period of time specified in grandfather clause).

[13] Although the subject of considerable dialogue at oral argument, this case also does *not* involve D.C. Code § 3-205.53(b) (1994 Supp.), which establishes a new 12-month certification period for all GPA recipients and specifies that no further payments be made for the same disability unless the grant is reviewed as a result of a reapplication by the applicant or recipient. This is so because the "disability" referred to therein is the one newly-defined in the 1991 legislation (Sec. 3-205.53(b) of the predecessor statute deals with "incapacity"), under which these plaintiffs have never qualified. Thus, their property interest, if any, flows not from their once having been found disabled and now seeking recertification under Sec. 3-205.53(b) (1994 Supp.), but from their being hold-over recipients under Sec. 3-205.42a(b) (1994 Supp.), the "grandfather clause" included in the Act specifically to address the plight of pre-July 1, 1991 recipients. Under established canons of statutory construction, absent contrary legislative intent a general statutory provision will not take precedence over a controlling specific statutory provision. *See Graham v. Berstein*, 527 A.2d 736, 739 (D.C. 1983). Therefore, we need not decide whether the 1991 legislation created implicitly a GPA benefits

Because D.C. Law 9-27 expressly limited plaintiffs' entitlement to benefits to a specific time period, namely, their current "certification period," plaintiffs had no property interest extending beyond that period of time. This certification period, therefore, was not a "procedural" mechanism for the enforcement of a right provided for under state law, but a substantive limitation upon that right. *See Atkins, supra,* 472 U.S. at 129. Hence, plaintiffs' reliance upon *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) is misplaced. While that case makes plain that where a property interest exists under state statute, the procedures to be followed in terminating that interest must comply with federal constitutional law, it sheds no light upon the issue presented herein; namely, whether, at the time their GPA benefits were terminated, these plaintiffs did in fact possess any property interest in such benefits. *Loudermill*, 470 U.S. at 544.

A case which does bear directly upon the issue, however, is *Banks v. Block*, 700 F.2d 292 (6th Cir.), *cert. denied*, 464 U.S. 934 (1983). There, the Sixth Circuit, after a review of the statute, legislative history and regulations governing the federal Food Stamp Program, as amended by Congress in 1977, concluded that "a household has no protected property interest in the continuous entitlement to food stamps beyond the expiration of its certification period." *Id.* at 297. Any anticipated receipt of food stamps beyond the certification period was deemed to be "an unprotected unilateral expectation" insufficient, under the holding of the Supreme Court in *Board of Regents v. Roth*, 408 U.S.

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program of continuing eligibility subject to periodic review, as plaintiffs contend, or a series of separate, independent entitlements limited to each 12-month certification period, as defendants assert. For *these* plaintiffs, as set forth in the text above, the post-June 30, 1991 entitlement was *expressly* limited by D.C. Code § 3-205.42a(b) (1994 Supp.) to the recipient's current certification period.

564 (1972), to create a constitutionally protected property interest. As did the Fourth Circuit in *Holman v. Block*, 823 F.2d 56 (4th Cir. 1987) and *Jackson v. Jackson*, 857 F.2d 951 (4th Cir. 1988), we, too, find the analysis of the Sixth Circuit in *Banks* persuasive. While there are differences between the District's GPA program and the federal food stamp program, there are some basic similarities, the most fundamental of which is that each provides benefits for a time-limited period (the certification period) and requires that recipients reapply if they wish to continue receiving the benefits. 7 U.S.C. § 2020(e)(4); D.C. Code §§ 3-205.42a(b) and 3-205.53(b) (1994 Supp.). Under both programs, the administrative agency implementing its requirements must issue timely notices to the recipients advising them of the coming expiration of their certification periods and informing them of the forms required to be submitted with, and the time limitations upon, any request for continuation of assistance. 7 U.S.C. § 2020(e)(4); D.C. Code § 3-205.53(c) (1994 Supp.). Finally, in the federal food-stamp program, benefits beyond expiration of the certification period are precluded pending administrative appeals. 7 U.S.C. 2020(c)(10). In the District's GPA program, such benefits likewise are precluded where, as here, the appeal is based solely upon a finding of non-disability.[14] D.C. Code § 3-205.53(c) (1994).

In attempting to distinguish the two statutes, plaintiffs state that, unlike the GPA program, Congress specifically declared in the legislative history of the food stamp program that it "is not a program of permanent or continuing eligibility subject to periodic review. It is a program of distinct and separate entitlements known as certification periods, which limit participation in the pro-

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[14] The 1991 legislation did not eliminate the right to continue receiving GPA benefits pending appeal of a termination based on any reason other than non-disability. Therefore, we express no opinion as to how any "property right" claim, if raised following such a termination, should be resolved.

gram." Appellees' Brief at 28 (quoting H.R. No. 95-464, 95th Cong. 1st Sess. 282). This attempted distinction, in referring to "the GPA program" as a whole, paints with too broad a brush and, hence, is misleading. Both the legislative history and the express language of the hold-over provision, D.C. Code § 3-205.42a(b), limit the benefit entitlement of pre-July 1, 1991 recipients to the expiration of the current certification period.[15] Finally, plaintiffs point out that under D.C. Law 9-27, a recipient who has made a timely request for continuation of benefits shall continue to receive such benefits until the Mayor has acted upon the request—even if this does not occur until after the expiration of the certification period. D.C. Code § 3-205.53(c) (1994 Supp.). Plaintiffs assert that this feature establishes the GPA program as one of continuing eligibility. They argue that there is no counterpart to this provision in the federal food stamp program. This is only partially correct. The food stamp regulations, while not permitting continued benefits beyond the certification period, respond to bureaucratic delay in acting upon a timely reapplication for benefits by placing an affirmative obligation on state agencies to act within the requisite time and by restoring to the affected household one month's worth of lost benefits as a result of the delay. 7 C.F.R. § 273.14(e). This restoration-of-benefits provision did not deter the *Banks* court from finding the food stamp entitlement to be time-limited to each certification period. *Banks, supra*, 700 F.2d at 297. Nor does the continuation of payments pending agency action deter us from finding the GPA entitlement of these hold-over recipients time-limited to the expiration of their current certification period. Such a finding flows irrefutably from the express language of

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15 "This provision permits individuals currently receiving GPA benefits under the incapacity provision to continue to receive those benefits until their recertification period arrives. At that time, the individual must then meet the new criteria to be eligible." Crawford Committee Report at 10, referring to what is now codified as D.C. Code § 3-205.42a(b) (1994 Supp.).

the "grandfather clause," D.C. Code § 3-205.42a(b) (1994 Supp.). Moreover, the continuation-of-payments provision was included in the statute to address one specific issue, namely, financial hardship occasioned by administrative delay. It requires too great a leap to infer from this simple act of legislative compassion a legislative intent that GPA benefits be of indefinite duration, particularly since a contrary intent is set forth so plainly in the statute itself. Simply put, at the end of the certification period then extant at the time D.C. Law 9-27 was enacted, these hold-over recipients had no "right" to continued benefits and stood under the statute in virtually the same posture as first-time applicants.[16] Under the law such an applicant to a government entitlement program has no constitutional right to receive benefits while his or her claim is being processed. *See Lavine v. Milne,* 424 U.S. 577, 586 (1976).

B. Property Interest, if Any, Derived from District's Implementation of D.C. Law 9-27

According to the trial court's findings, following the enactment of D.C. Law 9-27, the District utilized the same recertification process, and used the same forms in that process that it had used in the past. Moreover, it failed to advise those currently receiving GPA benefits or their doctors of the change in medical eligibility.

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[16] The trial court found that plaintiffs could not be considered like first-time applicants to a "new program" because, due to the manner in which D.C. Law 9-27 was implemented by DHS, there was no "new program". We need not resolve the trial-level semantics issue of whether this case involves a "new program," or simply new medical criteria to be applied in an ongoing program. Regardless of how one may characterize the "program," it is clear beyond peradventure that, at the expiration of their then-current certification periods, these hold-over recipients would be statutorily required, like every other applicant, to meet the new disability eligibility criteria. And that statutory requirement would remain, whatever may have been the conduct of DHS officials. It is in that sense that this Court holds they stand virtually in the same posture as first-time applicants.

Relying upon *Perry v. Sindermann*, 408 U.S. 593 (1972), the court thereupon concluded that even if the 1991 legislation did not itself create a legitimate expectation or claim of entitlement to continued receipt of GPA benefits, the District's practice in implementing that legislation, as set forth above, did so. Reviewing the record de novo on this appeal from a grant of summary judgment, and giving defendants, as we must under *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983), the benefit of all favorable inferences that can be drawn from the evidence, we are constrained to reject the trial court's conclusion.

The "process" simply involved DHS sending to each recipient, sixty days prior to the expiration of his or her certification period, a 60-day Notice enclosing two forms (a Social Information Report, to be executed by the recipient, and a Physical/Psychiatric Report, to be executed by the recipient's physician), a review of the executed forms by a DHS Medical Review Team upon the reapplication, and notice to the recipient of the Medical Review Team finding. Clearly there is nothing inherent in this process itself which would trigger any legitimate expectation of anything other than that the reapplication will, in due course, be acted upon by the Medical Review Team.

Nor do the forms create any such expectation. The General Public Assistance Notice (the 60-day Notice) in which the forms to be executed by the recipient and his or her physician are enclosed, instructs the recipient to return the two forms after they have been filled out. The Notice then states explicitly:

> After we receive your forms, if you are found eligible your checks will continue. If you are not found eligible, your checks will stop. Before we stop your checks, you will receive another notice explaining your rights.

As is seen from the quoted language, this Notice made abundantly clear to all those hold-over GPA recipients who reapplied for benefits that the reapplication may, or may not, be acted upon favorably.

As noted earlier in this opinion, the trial court found that, after the enactment of the 1991 legislation, neither recipients nor their doctors were informed by DHS that one could no longer qualify for GPA benefits based on incapacity. This omission, plaintiffs argue in their Brief, was particularly significant since the form to be filled out by the doctor, both before and after the enactment of D.C. Law 9-27, was the same, and it contained pre-printed wording advising the doctor that it "will be used to determine continued eligibility . . . predicated upon the physical or mental incapacitation of the client." As a result, plaintiffs assert, many physicians diagnosed an incapacity for patients who would have qualified as disabled. This argument, however, overlooks a critical fact. As Gwendolyn Hicks[17] testified in her deposition, the doctor, in filling out the Physical/Psychiatric Report form, is not to make a finding of incapacity or disability. That is done by the Medical Review Team. To assist the Medical Review Team in arriving at *its* determination, the pre-printed language on the form advises the executing doctor that "it is important that information be given relative to the exact nature and extent of the physical or mental incapacity." Under the GPA legislation in effect prior to July 1, 1991, a physical or mental "incapacitation" expected to last longer than 30 days was considered a "disability." However, neither before, nor after, July 1, 1991 was the doctor to concern himself with these labels. Rather, he was merely to report the nature and extent of the impairment, and defer to the

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[17] Supervisory Social Service Representative, Recertification Section, Income Maintenance Administration, Department of Human Services.

Medical Review Team to apply the appropriate label.[18] Finally, under the 1991 statute, once the hold-over recipient's current certification period ended there was no right to continued benefits unless the recipient met the new disability standard. Given this clear legislative mandate, plaintiffs could not have had any legitimate expectation that benefits would continue beyond that period—whatever may have been the conduct of, or forms used by, DHS during the recertification process. *See Delao, supra*, 560 F.2d at 1388-89 (citing *Roth, supra*, 408 U.S. at 578); *Williams v. Barry*, 490 F. Supp. 941 (D.D.C. 1980), *modified*, 708 F.2d 789 (D.C. Cir. 1983).

IV.

Adequacy of Notice

Beginning in mid-July, 1991, DHS mailed to each member of plaintiff class essentially the same Notice of Action terminating his or her GPA benefits, effective at the end of their current certification period. It stated, in part, "[T]he reason for this termination is because, based on the medical information you provided, you were not determined to be disabled." Omitted therefrom was any specification of the factual basis upon which DHS concluded that any particular recipient was not disabled.[19] The trial court, citing *Goldberg, supra*, found

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[18] It bears noting that, notwithstanding the seemingly limiting "physical or mental *incapacitation*" pre-printed language on the Physical/Psychiatric Report form, over 300 of the members of plaintiff class had been found to be suffering from a "disability" by the Medical Review Team under the pre-1991 legislation.

[19] The initial notices also contained internally contradictory language advising recipients in one paragraph that benefits would, and in another paragraph that benefits would not, continue in effect pending administrative appeal of non-disability findings. This contradiction was removed by a corrected Notice issued by DHS on November 14, 1991.

these factually non-specific boilerplate notices to be constitutionally inadequate to satisfy the Due Process Clause of the Fifth Amendment.[20] The District concedes on appeal that the Notice was inadequate.[21]

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[20] This ruling was made against the backdrop of another troubling notice matter. Prior to the terminations at issue herein, GPA recipients had not been sent any individual notice (notices were merely posted in GPA benefit offices at DHS) by DHS advising them that new legislation was now in effect which eliminated incapacity as a basis for GPA benefits and re-defined the disability criteria. The Notice issued on November 14, 1991, so advising, came *after* the terminations. Even if this lack of prior notice passes constitutional and statutory muster (it is not an issue raised in this appeal), it demonstrates a deplorable lack of sensitivity on the part of DHS toward the population it serves.

[21] The record on appeal is ambiguous as to whether this was a concession that the notice was constitutionally inadequate or only statutorily inadequate, under D.C. Code § 3-205.55 (1994 Supp.). There are two references in Appellant's Brief to the notice deficiency. Footnote 11 at page 13 reads, in pertinent part:

> The Superior Court found that recipients were entitled to know the basis of the (non-disability) determination, and the District does not challenge that ruling on appeal.

Footnote 14 at page 19 reads in its entirety as follows:

> As noted above, the Superior Court also found that the notice provided to GPA recipients was constitutionally deficient. Any problem with the notice, however, was corrected by the District's compliance with the terms of the permanent injunction. Thus, the District is not challenging the court's ruling with respect to the notices on appeal.

While the later footnote would seem to indicate a concession of constitutional inadequacy, this interpretation would be at odds with the central core of the District's principal argument on appeal, namely, that plaintiffs were not denied procedural due process (including the "adequate notice" component thereof) because, possessing no property interest to the continued receipt of GPA benefits beyond their certification period, no "process" was due them regarding a termination effective at the end of such period. Unfortunately, oral argument shed little light on the ambiguity, the District's lawyer stating merely, "we are not contesting that the agency doesn't have to provide notice." In any

V.

Lump-Sum Retroactive Payment

Finding that plaintiffs were denied procedural due process, the trial court ordered the reinstatement of benefits to those members of plaintiff class who preserved their rights[22] and whose benefits were terminated without adequate notice and opportunity for a pretermination hearing. It further ordered the District to pay these class members a lump-sum "retroactive sum of money equal to all such benefits that were not paid from the effective date of termination until the date of actual reinstatement." On January 22, 1993, this court granted the District's motion to stay the Superior Court's order requiring lump-sum retroactive payments. We now reverse that order.

The following except from the trial court's opinion of September 8, 1992, clearly illustrates the significant impact its finding that the District violated plaintiffs' Due Process rights had upon the court's retroactive payment order:

> A fifth, unrelated reason is the matter of consistency in the Court's legal analysis. Stated simply, if the Court finds that there have been unconstitutional violations that directly caused the cessation of benefits, there is no intellectually consistent reason to sanction the nonpayment by not requiring the disbur-

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event, having found persuasive and therefore accepted the District's contention that plaintiffs possessed no constitutionally protectable property interest, we view the District's "notice inadequacy" concession, notwithstanding the confusing footnotes in its Brief, to be limited to the violation of D.C. Code § 3-205.55 (1994 Supp.) only.

[22] Certain class members were deemed to have preserved their rights either by appealing their terminations or, for those who instead reapplied for benefits, by appealing the denial of such reapplication.

> sal of the money that should have been paid out. If the termination of payments was unconstitutional, such illegal government action cannot be rewarded (or the harm cheapened) by the refusal to impose monetary reparations.

Since we reject the trial court's finding that the District acted "unconstitutionally," we need not decide the correctness of its legal conclusion that the harm of such an unconstitutional violation would be "cheapened" by a refusal to impose monetary reparations. Rather, the question before us is whether the retroactive payment order can be sustained as a permissible remedy for the conceded violation of the "Adequate Notice" provision of D.C. Code § 3-205.55(a) (1994 Supp.)[23] The answer is, no. Contrary to the conclusion of the lower court, this case does not involve any violation, constitutional or statutory, which "directly caused the cessation of benefits." It was the failure of the plaintiffs to meet the new disability criteria required by D.C. Law 9-27 that caused the cessation of benefits, not the failure of DHS *thereafter* to provide them with detailed, fact-specific notices setting forth the reasons for the non-disability findings and spelling out, in non-contradictory language, the recipient's appeal rights. In *Foggs v. Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985), the United States Court of Appeals for the First Circuit denied restitution under similar circumstances, even though the notice

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[23] D.C. Code § 3-205.55(a) (1994 Supp.) reads, in pertinent part:

> The Mayor shall give timely and adequate notice in case of intended action to . . .terminate . . .assistance . . .
>
> (2) "Adequate" means that the written notice includes a statement of what action the Mayor intends to take, the reasons for the intended action, the specific law and regulations supporting the action, an explanation of the individual's right to request a hearing, and the circumstances under which assistance will be continued if a hearing is requested.

involved there was constitutionally deficient. In *Foggs*, the Massachusetts Department of Public Welfare sent notices to food stamp recipients advising them that their benefits may be reduced or terminated as a result of an August, 1981 amendment to the Food Stamp Act which reduced the earned income deduction from twenty to eighteen percent. The District Court found these notices to be constitutionally defective and ordered restoration of benefits pending the delivery of constitutionally adequate notices. On appeal, the First Circuit agreed that the notices were constitutionally deficient, but reversed the trial court on the issue of the proper remedy, stating:

> The restoration of benefits to all recipients was unwarranted, given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated. Restoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress.

Foggs, 722 F.2d at 941.

In its attempt to distinguish *Foggs*, the trial court in this case commented in its opinion accompanying the Permanent Injunction:

> Second, the instant class action is certainly not the kind of case in which there is doubt that "a substantial percentage of these recipients had their benefits improperly reduced or terminated." All of the class members were denied a pretermination hearing, without any exception or qualification. This constitutional violation was uniform to all class members. Furthermore, they all received the same boilerplate notices that were misleading also in uniform fashion.

(internal citations omitted). But this attempted distinction misses the mark. The Circuit Court in *Foggs* was not referring to whether a substantial percentage of food stamp recipients were terminated improperly due to lack of notice or pretermination hearings. The "absence" it

referred to was of benefit reductions stemming from agency miscalculations.[24] In addition, *Foggs* also reasoned that a restoration of benefits would constitute a windfall to recipients, and would result in the continuation of benefits at a level exceeding that authorized by Congress. That is no less true in this case. The District of Columbia Council has authorized GPA benefits only for those persons found disabled under D.C. Law 9-27. To provide retroactive payments to those class members who do not satisfy this disability standard is to ignore the Council's substantive limitation on who should receive GPA benefits. Such an award is particularly unwarranted where, as here, (1) the financially-strapped District in all likelihood would be unable to recover any retroactive payments made to those class members who were unsuccessful in their administrative appeals of non-disability findings, and (2) the 1991 statute itself, at Section 3-208.1 (1994 Supp.), allows for retroactive payments where the recipient *does* prevail in his administrative appeal of a non-disability finding.

Finally, such an award cannot be justified under a "balancing of the equities," as was done in *Archer v. District of Columbia Dep't of Human Resources*, 375 A.2d 523 (D.C. 1977). The retroactive payment was to cover benefits not paid from the effective date of termination (*i.e.,* end of certification period) until the date benefits resumed under the reinstatement order. A balancing of the equities had already been done by the D.C. Council when, in 1991, with the city facing a financial crisis, it enacted what is now D.C. Code § 3-205.53(c) (1994 Supp.), eliminating the "incapacity" medical criteria and repealing that provision of the

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[24] In the instant case, although plaintiffs allege in their Brief, at 9, that a disproportionate share of terminations of GPA benefits by DHS were erroneous, specific allegations of error are made only in reference to the four named plaintiffs and one other person. Even if proven, this is hardly "substantial," under *Foggs* or any other yardstick.

Public Assistance Act of 1982 which allowed benefits to continue pending administrative appeals of non-disability findings. The Council was well aware of the impecunious status of the population that would be affected by this repeal as well as the elimination of the incapacity eligibility standard for GPA benefits. But, as noted in the Crawford Committee Report, at 19:

> (Council Chairman John Wilson) stated that the present financial situation calls for some hard, unpopular decisions, and that this one is one of the first that the Council will have to make.

Earlier in this opinion we upheld the constitutionality of D.C. Code § 3-205.53(c) (1994 Supp.), one of the statutory mandates resulting form those "hard, unpopular" decisions. It precludes the payment of GPA benefits during the pendency of non-disability administrative appeals. We now conclude that the trial court abused its discretion in awarding lump-sum retroactive payments covering any portion of that period as a remedy for what was no more than a violation of the "adequate notice" provision of D.C. Code § 3-205.55 (1994 Supp.). *See District of Columbia v. Gray*, 452 A.2d 962 (D.C. 1982) (reversing an award of back pay to teacher discharged in violation of statute).

VI.

The Cross-Appeal

By order entered October 27, 1992 on the District's Motion for Clarification, the trial court modified the Permanent Injunction of September 8, 1992 by excluding from its reinstatement coverage those members of plaintiff class who, upon receiving termination notices from DHS, reapplied for GPA benefits but failed to appeal the denials of their reapplications. In their cross-appeal, plaintiffs contend that the trial court erred in making this exclusion. We disagree and affirm.

Those persons who failed to appeal a denial of their reapplication effectively abandoned any claim that they were entitled to a continuation of benefits. There is no sound reason to require the District to expend its scarce resources providing GPA benefits to persons who, for whatever reason, are no longer contending that they are entitled to them. The trial court's refusal to order the District to do so was clearly a reasonable exercise of its equitable powers.

VII.

Conclusion

For the foregoing reasons, on defendants' appeal we reverse and remand, with instructions that the trial court modify the Permanent Injunction in accordance with this opinion.

On plaintiffs' cross-appeal, we affirm.

APPENDIX B

[Filed July 3, 1996]

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 92-CV-1157 and 92-CV-1448

MARION BARRY, *et al.*, Appellants/cross-appellees,
CA14119-91

v.

BIVENS LITTLE, *et al.*, Appellees/cross-appellants.

BEFORE: *Wagner, Chief Judge; Ferren, Terry, *Steadman, Schwelb, Farrell, King, **Ruiz, and Reid, Associate Judges; +*Bowers, Associate Judge of the Superior Court of the District of Columbia.

ORDER

On consideration of the petition of appellees/cross-appellants for rehearing or rehearing en banc, the motion of appellants/cross-appellees for leave to file opposition to petition, and the lodged opposition, it is

ORDERED that the motion of appellants/cross-appellees for leave to file opposition is granted and the Clerk is directed to file the lodged opposition. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associate Judge Ruiz has recused herself from these cases.

+Sitting by designation pursuant to D.C. Code § 11-707(a).

Associate Judges Ferren and Farrell would grant rehearing en banc.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

ELNORA BROWN, *et al.*

v.

SHARON PRATT KELLY, *et al.*

91 CA-14119

Calendar 13

Judge Long

MEMORANDUM OPINION

The plaintiffs herein seek a preliminary injunction against the Mayor of the District of Columbia and other relevant District officials to stop the interruption of certain general public assistance benefits. This lawsuit was filed in the wake of certain 1991 legislation that serves to change the medical criteria for these benefits. This memorandum opinion provides in detail the factual and legal basis underlying this Court's decision to grant that preliminary injunction of even date herewith.

I. *PROCEDURAL HISTORY*

The instant civil action was filed by four named plaintiffs on November 13, 1991 on behalf of themselves and others "similarly situated." After initial briefing by counsel for the parties, this Court heard oral argument on the Motion for Preliminary Injunction on January 17, 1992.

This Court issued an order on January 29, 1992 certifying this case to be a class action, defining the plaintiff

class, and designating the original four named plaintiffs as class representatives.

As the Court has previously noted, the crux of the complaint can be summarized as follows. The new legislation significantly tightened the medical basis of eligibility for general public assistance. Specifically, the new law, which was effective as of July l, 1991, requires that anyone receiving benefits because of a medical inability to work is now required to show that he or she is "disabled" and not merely "incapacitated."

While the plaintiffs do not challenge the authority of the District of Columbia Council to enact new criteria, the plaintiffs have filed suit because of the process under which current recipients have been subject to sudden termination of their benefits.

The individual, named plaintiffs are Elnora Brown, Lillie Mabry, Bivens Little, and Francis Hall. They represent an entire class of plaintiffs who are all District of Columbia residents whose benefits were terminated on or after July l, 1991 on the ground that such persons were found by the Department of Human Services not to be "disabled" and whose benefits were terminated without a hearing and without a specific notice as to the actual basis of the administrative finding.

Defendants herein are the Mayor, as well as Vincent C. Gray (Director of the Department of Health and Human Services) and James Butts (administrator of the Income Maintenance Administration).

As a class, the plaintiffs assert that they were denied due process of law by the denial of a pre-termination hearing and by the issuance of a terse, inadequate notice of ineligibility for continuation of their benefits. Such notices were sent without any articulation of the individualized, underlying reasons why such persons were deemed ineligible. In some cases, federal Food Stamp

benefits were also revoked simultaneously with the stoppage of these public assistance grants.

Because of the nature of the allegations and the status of the plaintiffs as current recipients, this litigation does not concern those persons who were brand new applicants for benefits in the post-July l, 1991 era.

Upon the following findings of fact and conclusions of law, this Court has determined that plaintiffs have demonstrated the need for a preliminary injunction. This relief is vital, in order to halt any further terminations of benefits without a sufficient notice and opportunity for a fair pre-termination hearing pending the final outcome of this litigation.

II. *FINDINGS OF FACT*

The parties have filed abundant factual material in support of their positions. This factual data includes affidavits from the plaintiffs as well as depositions of relevant government officials and other persons who have direct knowledge of the disputed benefits program. Also included in the court record are numerous supplemental exhibits, filed by plaintiffs, primarily affidavits of various class members.

The issuance of the preliminary injunction is based upon specific factual findings that include such topics as the pertinent features of the pre-existing disability benefits program, the 1991 legislative modification of that program, and the operational aspects under the new medical criteria. Moreover, the Court makes factual findings as to the practical impact of the new legislation upon the plaintiff class, as illustrated by the personal accounts of the named plaintiffs. Those findings are set forth as follows, with citations to the factual sources in the record.

A. The Benefits Program

1. The District of Columbia's General Public Assistance Program (hereinafter "GPA") is a public welfare system of long standing. Its provisions are set forth in Title 3 of the District of Columbia Code, in Section 205.1 *et seq*. It is this statutory scheme that was modified by the Council of the District of Columbia, effective July 1, 1991.

Prior to July l, 1991, the law of the District of Columbia extended these financial entitlements to a variety of citizens, such as adults who were incapacitated or temporarily unemployable (designated "GU"), adults who were disabled (designated "GS"), and certain children who were not eligible for AFDC benefits from the United States Government.

2. More specifically, citizens were deemed eligible for GU benefits if they were financially needy, over the age of 18 and physically "incapacitated." The term "incapacitated" was defined in the statute as a condition in which the person had a "physical or mental defect, illness, or impairment . . . of such a debilitating nature as to reduce substantially or eliminate the [applicant's] ability . . . to care for or support himself or herself and that [such condition was] expected to last for a period of at least 30 days." 3 D.C. § 205.42(1)(B) (1988).

3. The GS benefits were afforded to people who had more serious, *i.e.* disabling, impairments which lasted or were expected to last for twelve months, or result in death. 3 D.C. § 205.41(2). Moreover, it was expected that persons receiving these funds would apply for federal Supplemental Security Income benefits (hereinafter "SSI") and that the District ultimately would be reimbursed for its GS benefits that were paid while the SSI application was pending. 3 D.C. § 208.5.

4. Historically, benefits recipients were never told by DHS whether they were being granted these funds as

"incapacitated" persons or because they were found to be "disabled." This has been verified in the deposition testimony of Gwendolyn Hicks, a supervisory social service representative, who reviewed recertification requests. There was never any official designation of either status and, as a practical matter, District officials believe that most recipients assumed that they originally had been declared "disabled." Hicks Deposition, at pages 26-27. In fact, according to Hicks, "A lot of [the] customers confused the public assistance program with Social Security." Hicks Deposition, at page 27.

5. After obtaining general public assistance benefits, a citizen could continue receiving funds under the following scenarios. Recipients could receive benefits for discrete "certification" periods not to exceed six months duration. The first certification period could be renewed by filing a request for an extension and other related forms.

The process for obtaining recertification commenced 60 days prior to the actual end of the individual's current eligibility period. If the recertification process was followed in timely fashion, there generally would be no interruption of benefits while a final decision was pending. 3 D.C. § 205.53. Recertification merely required the recipient to personally update general information and to insure that his or her physician file a more recent report.

The failure to submit a timely recertification package would result in the issuance of a termination notice.

6. The termination procedures were as follows. The Mayor has the authority to discontinue, withhold, suspend, reduce or change the conditions of payment of these benefits, upon providing a "timely and adequate notice." 3 D.C. § 205.55(a). Adequate notice is defined for this purpose as a written notice that includes

> a statement of what action the Mayor intends to take, the reasons for the intended action, the specific law

and regulations supporting the action, an explanation of the individual's right to request a hearing, and the circumstances under which assistance will be continued if a hearing is requested.

3 D.C. § 205.55(a)(2).

7. If a recipient requests a hearing within 15 days from the date of the postmark of the written notice, benefits will not be interrupted until a final decision has been made, absent other unusual factors that are itemized in the statute. 3 D.C. § 205.59(a). Furthermore, even when a recipient has not requested an immediate hearing, he or she may still request a hearing within 10 days following the date on which a termination would become effective and this request (albeit belated) would still preserve the payment of benefits pending the outcome of the hearing. 3 D.C. § 205.59(c).

B. The New Legislation

8. On July l, 1991, the Council of the District of Columbia enacted legislation which implemented several changes in the eligibility standards for the District's GPA benefits program. The law is known as the Omnibus Budget Support Emergency Act of 1991, D.C. Act 9-37 (emergency legislation) and the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991, D. C. Law 9-27 (permanent legislation). The permanent Act adopts all of the provisions of the emergency bill. A copy of D.C. Act 9-27 is attached hereto. The Mayor signed the act on July 2, 1991 and the law went into effect on August l7, 1991. It was published in the *D.C. Register* (Vol. 38, page 4205) and is reproduced in the record of this case as Exhibit 1 to Plaintiffs' Motion for Preliminary Injunction.

9. The Council hereby made several adjustments to the GPA program, such as changing the certification period for everyone to a term of 12 months. More importantly, however, the Council mandated a signifi-

cant change in the basic medical criterion for obtaining GPA benefits. Amending the original language of the Code, the Council created a new Section 542(a) of the Act, which reads:

> Except as provided in subsection (b) of this section, beginning July 1, 1991, an individual shall be eligible for GPA benefits only if the individual has a disability as defined in section 542(b) of this act.

The newly created Section 542(b) states,

> An individual who is receiving GPA benefits on June 30, 1991, may continue to receive GPA benefits until the expiration of the individual's certification period. Benefits beyond the expiration of the certification period shall not be paid to an individual unless the GPA recipient reapplies for benefits and is determined to have a disability as defined in section 542(b) of this act.

As a practical matter, this new language is actually the new language for the published portions of the Code, quoted herein above, namely: 3 D.C. § 205.42.

10. Another important change is a new definition of the term "disabled." The section of the law defining this term now states that a person "shall be deemed to be disabled, if the individual is determined by the Mayor to be disabled based upon the criteria for the supplemental security income program established pursuant to the Social Security Amendments Act of 1972 . . . ." Thus, the Council imposed entirely new language in the published Code provision cited as 3 D.C. § 205.42(2).

11. Significantly, there is only one aspect of this legislation that is subject to a constitutional attack in the instant civil action.

Specifically, the provision of the new law that is subject to constitutional interpretation by this Court is embraced in the following modification to 3 D.C. § 205.42, namely, that

> benefits shall not be continued beyond the effective date of the termination if the sole basis for the individual's appeal or the termination is the failure to meet the disability standard in section 542 (D.C. Code § 3-205.42).

Thus, the Council gave blanket authorization to the executive branch to halt the flow of benefits, even during the process of a beneficiary's appeal of a termination, whenever the issue was the failure to meet the new disability standard. The plaintiffs assert that their Fifth Amendment right to due process of law precludes such termination under these discrete circumstances.

C. The New Law in Operation

12. The District's implementation of the new legislation is described in detail in the sworn deposition testimony of Gwendolyn Hicks and Kate Jesberg, as well as affidavits of Jesberg and other persons. Jesberg is the Special Assistant to the Administrator of the Income Maintenance Administration, within the Commission on Social Services of Department of Human Services (hereinafter "DHS"). For purposes of these factual findings, the Court accepts their testimony as an accurate reflection of how the disputed terminations were conducted.

13. First, the persons deemed to be "incapacitated" and who were receiving benefits as of June 30, 1991 were targeted to receive written notices informing them that their benefits were being cut off. Each such notice merely stated that the medical review team of DHS had not found him or her not to be "disabled." Hicks Deposition, at page 70.

14. Copies of notices to the named plaintiffs are attached as exhibits to the deposition of Gwendolyn Hicks. Visual inspection quickly reveals that these notices all were composed of identical, boilerplate language and each lacked any informational description of the defi-

ciency in the particular recipients medical status. Hicks Deposition, Exhibits 2, 3, 4, and 5. The termination notices did not cite, for example, any specific reports, x-rays, or other medical evidence in support of the finding of nondisability. Nor did they describe whether the absence of such data was the determining factor that compelled termination. Hicks Deposition at pages 71-72.

15. Each of the four named plaintiffs received the identical termination notice, save for one variation that is described in paragraph 25 of these Findings. Hicks Deposition at pages 72-73. As will become clear, that variation had no connection to the substance of the medical decision. Insofar as the notices purported to cite a reason for termination, they contained only the conclusory statement, "The reason for this termination is because based on the medical information you provided, you were not determined to be disabled." Hicks Deposition, Deposition Exhibit Nos. 2, 3, 4, and 5. A copy of Exhibit 5 is attached hereto as an example of the notice.

16. At least one plaintiff, during this recertification process, had in fact submitted reports from his treating physician stating that he was permanently and totally disabled. Rodgers Affidavit, Exhibit 8, ¶13. Mr. Noel-Bob Rodgers was a 1987 beating victim who suffered serious nerve damage and who continues to endure chronic pain. Affidavit, ¶¶3-6. His termination notice did not afford any explanation whatsoever as to why or how the MRT reached a contrary conclusion. Hicks Deposition at pages 117-121. Rodgers has been told that it will be "months" before his SSI application is processed. Affidavit at ¶26. He has no savings or other income other than his $258.00 per month GPA benefits (now extinguished) and Food Stamps. Affidavit at ¶¶9, 19, and 24.

17. The process that preceded the issuance of the disputed notice included the following steps. The GPA recipients were subjected to the very same recertification

process that had been operational in the past. Deposition of Hicks, at pages 67, 85-86, and 88; *see also* Affidavit of Kate Jesberg, attached as Exhibit 1 to the Opposition of Defendants to Plaintiffs' Motion for a Preliminary Injunction. Exactly the same forms were used, such as the Physical/Psychiatric Report Form (for a physician to complete). Hicks Deposition at pages 52-53 and 59-61.

18. The recertification forms were reviewed by the medical review team, known as the "MRT." If the MRT found a recipient to be "disabled," his or her benefits continued without interruption. On the other hand, if the MRT recertified the person as "incapacitated," as happened in most instances, then the benefits were instantly terminated. Butts Deposition at pages 52-54.

19. At no time prior to or during the recertification process did GPA recipients or their doctors receive a notice from DHS warning that the person was to be evaluated under the new medical eligibility standard. Most, if not all, recipients were unaware of the change in the law. Hicks Deposition at pages 89-90.

20. GPA recipients had no clue whatsoever that they no longer met the medical eligibility criteria until they received their termination notices. Hicks Deposition at pages 90-91. Thus, recipients had no opportunity to rebut or otherwise attempt to forestall this finding of non-disability prior to the decision to terminate their benefits. Hicks Deposition at page 91. They had no chance, for example, to correct the agency's reliance upon incorrect or misplaced data prior to the actual interruption of their benefits.

21. Each plaintiff was terminated based upon what purported to be an individualized factual finding that he or she was not "disabled." The termination notices represented the District's specific findings based upon the recipients' personal medical history, age, educational background and prior work history. Hicks Deposition at pages 77-78.

22. No plaintiff was ever provided a notice that he or she was being terminated as a result of a wholesale elimination that was not subject to personal interpretations. Nor was any other reason asserted for the terminations, other than a recipient's individual failure to meet the new medical standard. Hicks Deposition at pages 81-82.

23. No plaintiff who was terminated because of these non-disability findings received a pre-termination hearing. Defendant's Answer to Plaintiff's Interrogatory No. 13, Plaintiffs' Supplemental Exhibit 23.

24. Prior to July 1, 1991, whenever a person was found to be medically ineligible for GPA benefits, the payments remained in effect, uninterrupted, during the pendency of a timely appeal. After July 1, 1991, no recipient who failed the new medical standard was paid any benefits pending the appeal of his or her termination. Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, at pages 3-4 and 5.

25. The issuance of the notices was initially flawed and confusing. The first notices were mailed out in mid-July, 1991. Hicks Deposition, at page 73. Initially, they contained contradictory language that informed recipients that their benefits would remain in effect, pending administrative appeal—and additional language that stated the very opposite. The notices were not corrected until mid-November, 1991. At that time, an entirely new set of notices was issued, stating unequivocally that benefits would cease immediately. Hicks Deposition, at page 75.

D. Impact Upon the Plaintiffs

26. All four of the named plaintiffs share the following factual experiences under the new legislation: (1) all were GPA recipients prior to July 1, 1991; (2) each received the same, boilerplate notice of termination (described herein), lacking any meaningful explanation

of the reason for termination; (3) the benefits of each person were terminated as a result of the issuance of the notice; and (4) no pre-termination hearing was available to any of them. Affidavits of Elnora Brown, Exhibit 3; Lillie E. Mabry, Exhibit 4; Bivens Little, Exhibit 5; and Francis Hall, Exhibit 6.

27. The maximum amount of any grant under the GPA program is $258.00 per month. Hicks Deposition at page 11.

28. Most of the plaintiffs, at the time of termination, were receiving the full GPA grant of $258.00 per month. See, e.g., Brown Affidavit, Exhibit 3, ¶10; Little Affidavit, Exhibit 5, ¶6; Hall Affidavit, Exhibit 6, ¶8; Rodgers Affidavit, Exhibit 8, ¶¶11 and 12; Campbell Affidavit, Exhibit 10, ¶8; Batts Affidavit, Exhibit 13, ¶5; Jackson Affidavit, Exhibit 14, ¶16.

29. Persons who receive the maximum amount of benefits of $258.00 per month are not permitted to retain any other cash resources *in excess of $300.00*. Hicks Deposition at page 11.

30. Upon termination, those plaintiffs who were somehow able to rent apartments or rooms in boarding houses faced the immediate threat of initiation of eviction proceedings because of their inability to pay rent. Brown Affidavit, Exhibit 3, ¶23; Mabry Affidavit, Exhibit 4, ¶17; Little Affidavit, Exhibit 5, ¶13; Hall Affidavit, Exhibit 6, ¶¶14 and 17; Rodgers Affidavit, Exhibit 8, ¶21; Campbell Affidavit, Exhibit 10, ¶13; Newsome Affidavit, Exhibit 11, ¶11; Batts Affidavit, Exhibit 13, ¶7; Turner Affidavit, Exhibit 20, ¶8.

31. The termination of benefits for homeless plaintiffs who lived in shelters or on the street served to preclude any chance of obtaining independent housing. Homeless recipients are affected by the terminations because they cannot purchase medication, clothing, etc. and cannot

pay for transportation to medical appointments. Turner Affidavit, Exhibit 20, ¶8.

32. Beneficiaries who were paying for their own living space and who were paying utility expenses faced the cut-off of utilities or at least telephone service. The loss even of telephone services created a serious risk of personal safety and health, given their serious, underlying health problems. Rodgers Affidavit, Exhibit 8, ¶21; Cole Affidavit, Exhibit 12, ¶8; Batts Affidavit, Exhibit 13, ¶7.

33. Termination of benefits also resulted in the loss of access to public transportation, for some plaintiffs. Rodgers Affidavit, Exhibit 8, ¶21; Newsome Affidavit, Exhibit 11, ¶10; Batts Affidavit, Exhibit 13, ¶7; Jackson Affidavit, Exhibit 14, ¶¶16 and 19; Turner Affidavit, Exhibit 20, ¶8.

34. In turn, the lack of access to public transportation restricted plaintiffs' ability to travel to physicians' offices and to obtain medical supplies. Turner Affidavit, Exhibit 20, ¶8; Affidavit of Dr. Jeanelle Goetches, Exhibit 24, ¶¶7 and 8 (hereinafter "Goetches Affidavit").

35. Dr. Goetches is the Medical Director for Health Care for the Homeless in Washington, D.C. and she is also Medical Director of Christ House, a facility for 34 homeless patients. She emphasizes, among other things, that the medical needs of some patients who are GPA recipients include: (1) the necessity of traveling to multiple specialists and (2) the need for certain types of nutritional regimens, particularly for diabetics. All of these needs are compromised by the withdrawal of GPA benefits. Goetches Affidavit, at ¶9.

36. One of her GPA patients, for example, is a 52 year-old homeless man with a constellation of chronic health problems, including: hypertension, glaucoma, gouty arthritis, emphysema, arteriosclerosis, and a host of other conditions. Affidavit of Goetches at ¶6. The

significance of the loss of GPA benefits to this individual needs no explanation. The other affidavits, cited herein, contain similarly vivid details of the personal circumstances of each affiant.

37. After the terminations were effectuated, many of the plaintiffs were told by their case workers to file applications for federal SSI benefits, even though it is generally known that the average processing time for such applications is between 120 and 180 days. Hicks Deposition at page 103; Brown Affidavit, Exhibit 3, ¶21; Rodgers Affidavit, Exhibit 8, ¶26.

38. As to the termination of Food Stamp eligibility, the defendants have made the following representations through their counsel. In defendants' proposed factual findings, supplied to chambers at the request of the Court, defense counsel states:

> In addition to their due process argument over the new eligibility guidelines, plaintiffs contend that the District is violating applicable law governing its Food Stamp program by automatically terminating food stamp benefits when General Public Assistance is denied. As plaintiffs correctly note, the two programs are separate and have somewhat different eligibility criteria. As such, termination of benefits in the General Public Assistance program should not lead to automatic termination of benefits under the Food Stamp program because the two programs have different eligibility criteria. Defendants agree that initially they were automatically terminating Food Stamp assistance when General Public Assistance was terminated. However, defendants informed plaintiffs prior to the filing of their lawsuit that this practice had ceased. In fact, once Public Assistance benefits are terminated Food Stamp assistance continues until a separate eligibility determination can be made. Affidavit of Kate Jesberg at ¶17. As such, this claim is now moot. Further, any recipient who

experienced a lapse in benefits is eligible to receive benefits for the relevant time period.

Defense counsel also stated in a footnote to his proposed findings, "Contrary to plaintiffs' claims, even when Food Stamp benefits were initially discontinued, applicants received advance notice." For present purposes, the Court accepts the representations of the Office of Corporation Counsel on this issue in light of the absence of any rebuttal to this fundamental explanation.

II. *CONCLUSIONS OF LAW*

The decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the trial court. *In re Antioch University*, 413 A.2d 105, 109 (D.C. 1980). This Court's conclusions of law regarding issuance of a preliminary injunction must be framed according to the traditional four factors that are crucial considerations.

To properly exercise its discretion, this Court must take into account "whether the moving party has clearly demonstrated (1) that there is a substantial likelihood [plaintiffs] will prevail on the merits; (2) that [plaintiffs are] in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to [plaintiffs] from the denial of the injunction than will result to the defendant[s] from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order." *Stamenich* v. *Markovic*, 462 A.2d 452, 456-457 (D.C. 1983), quoting *Wieck* v. *Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

For over two decades, courts have looked to these issues in weighing the propriety of imposing the extraordinary remedy of an injunction. *See Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1971); *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F.2d

921 (D.C. Cir. 1958). Each of the four factors is addressed as follows.

A. Likelihood of Prevailing on the Merits

The Court concludes as a matter of law that if this case goes to trial there is a substantial likelihood that the plaintiffs would prevail on the merits. Terminations of plaintiffs' GPA benefits are based on individualized factual determinations that recipients do not meet the criterion of "disability." Termination notices sent to recipients do not explain on an individual basis precisely why they are being terminated nor is there an opportunity to challenge, prior to termination, any erroneous information. Defendants' termination of plaintiffs' GPA benefits without adequate notice and an opportunity for a pre-termination hearing violates the Due Process Clause of the Fifth Amendment.

Pertinent Case Law

The Supreme Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) established the principle that welfare payments are statutory entitlements for persons qualified to receive them, and because they are property interests, certain due process rights are mandated in the context of termination. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding the loss outweighs the governmental interest in summary adjudication." *Id.* at 262-263.

In *Goldberg*, New York residents receiving financial aid under Aid to Families with Dependent Children (AFDC) and New York State's general Home Relief program[1] were terminated or about to be terminated

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[1] AFDC was established by the Social Security Act of 1935 and is a joint federal/state program established to provide cash benefits

from these programs without prior notice and a hearing. The court held that "a recipient [must] have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-268.

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269, quoting *ICC* v. *Louisville & N.R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963). The *Goldberg* court stated that for those recipients who qualified, welfare payments provided the means to obtain essential necessities of living—food, clothing, housing and medical care. *Id.* at 264. This is true also where GPA benefits are concerned.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) the court delineated three factors that must be considered in determining what process is due when entitlements are terminated. These are:

1. the private interest that will be affected by the official action;

2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

3. the government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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to families with needy children. The New York Home Relief program is a general assistance program financed and administered solely by New York state and local governments. It assists any person unable to support himself or to secure support from other sources. *Goldberg* v. *Kelly*, *supra* at 256 n. 1.

Id. at 335. In order for the dictates of *Mathews* to be met, adequate notice must be given to plaintiffs whose benefits may be discontinued and a pre-termination hearing must be provided for those that request it. In *Mathews*, the Court held that a pre-termination hearing was not required prior to the termination of Social Security disability benefits. The Court distinguished its earlier holding in *Goldberg*, specifically because Social Security disability benefits are not predicated on financial need,[2] and those receiving these benefits had other sources of income.

Defendants state that plaintiffs' reliance on *Goldberg* and *Mathews* is "misplaced." Defendants argue that plaintiffs have no right to procedural due process under the Fifth Amendment since the change in the law is only an "across the board" change in eligibility for which a hearing and individual notice are not required.

For this proposition, defendants rely on the Supreme Court decision in *Atkins* v. *Parker*, 472 U.S. 115 (1985). There, the Massachusetts Department of Public Welfare responded to an amendment to the Food Stamp Act passed by Congress reducing from 20 percent to 18 percent the earned income disregard used in computing eligibility for food stamps. The Department mailed a notice to all food stamp recipients advising them of the reduction. The notice stated that this reduction might result in either a reduction of their benefits or termination. The notice also stated that they had a right to request a hearing, and that their benefits would be reinstated if a hearing was requested within 10 days of the notice.

The Federal District Court issued a temporary injunction in favor of the plaintiffs, stating that the notice was

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2 "The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need. . . ." *Mathews* v. *Eldridge*, *supra*, at 340 n. 24.

inadequate. The Department sent a second notice similar to but more extensive than the first. The Supreme Court held that this second notice was sufficient. Additionally, the court held that when a "mass change" occurs, a notice of adverse action is not required because individual computations are not required in such cases. When a "mass change" occurs all that is required is "(1) that individual notice be sent and (2) it inform them of the change." *Id.* at 126.

Defendants incorrectly rely upon *Atkins* for the proposition that the change in the GPA program is an across the board mass change in eligibility requirements, and that therefore there are no property interests implicated and no need for a more detailed notice or a pre-termination hearing. In *Atkins* only a simple mathematical computation had to be used to determine whether a person's food stamp benefits might change. This is a highly significant distinction.

The change in medical eligibility requirements in the instant case simply cannot be analogized to a "mass change" in order for the District of Columbia to escape the requirements of due process. This is because each recipient can only be terminated based upon individualized factual determinations applying the medical and other specific criteria. Each recipient in the instant case presents a unique set of circumstances, given his or her medical history, age, education and prior work history. Not one plaintiff in the present case received notice that he or she was being terminated as a result of a "mass" elimination in the program.[3]

Welfare benefits are a statutory entitlement to those eligible to receive them. "Their termination involves state action that adjudicates important rights." *Goldberg* v. *Kelly*, *supra*, at 262. "Where welfare is discontinued,

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[3] Hicks Deposition, pp. 81-82.

only a pre-termination evidentiary hearing provides the recipient with procedural due process." *Id.* at 264.

The Supreme Court's holding in *Mathews* is clearly not dispositive of the issue regarding the hearing requirement. This is true for several reasons.

First, in *Mathews*, the plaintiffs were not in the same status as the plaintiffs here. The recipients in *Mathews* were not caught in a situation in which they were being switched to the SSI program out of a pre-existing general welfare system where normally they would have had the right to a pre-termination hearing. In the instant case, the plaintiffs were caught in the middle of the actual conversion.

Second, the Supreme Court's reasoning in finding no right to a pre-termination hearing was in part premised upon the plaintiffs' continuing right to avail themselves of their local welfare system if their SSI benefits were not sufficient for their needs. *See Mathews* v. *Eldridge*, *supra*, at 342. This is clearly not the case with the present plaintiff class because they are already using the only local welfare system that is available to them and, by definition, they are not already receiving SSI benefits. The Supreme Court paused to observe,

> Eligibility for disability benefits, in contrast [to ordinary welfare], is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pension, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force."

Mathews v. *Eldridge*, *supra*, at 340-341 (footnotes omitted). The plaintiffs here are recipients of benefits

while they are "on the very margin of subsistence." *Id.* at 340.

Third, the Social Security disability benefits scheme does not impose the same strict financial limitations that are found in the GPA program and the local restrictions on having other income and assets were never eliminated by the Council's action. In other words, people who receive SSI benefits were still permitted to have other sources of income and were not required to divest themselves of other economic assets. Such financial limitations are indeed still imposed upon GPA recipients in spite of the new law that merely addresses the medical standard. This, too, is a highly significant distinction. These distinctions are all relevant to the "private interest" analysis under the three *Mathews* criteria for determining the right to a pre-termination hearing.

Due Process Requirements

The Court finds as a matter of law that to satisfy due process requirements mandated by *Goldberg* the defendants must provide individualized notice to each member of the plaintiff class and if a plaintiff is found not to be disabled, a pre-termination hearing must be held.

Notice Requirement

As previously described herein, the plaintiffs all received an identical, boilerplate notice. The Affidavit of Noel-Bob Rodgers ¶13 indicates that two medical reports he submitted for recertification purposes clearly indicate that he is disabled. However, the medical review team, using these reports found him not disabled. On his termination notice, there was no clue as to how or why the medical review team arrived at this contrary decision.

Because this situation has occurred with at least one person, there is a very real danger confronting many other plaintiffs.

There is clearly a risk of unfounded and unjust adjudications. This is exemplified in what happened to plaintiff Rodgers.

When plaintiffs are put on notice as to exactly why they are deemed not disabled, then they are able to respond in a focused manner. A person cannot adequately defend against something that he or she does not know about. Though defendants were required pursuant to D.C. Code § 3-205.42(b), as amended by D.C. Law 9-27, § 2(e)(3), to apply SSI criteria in evaluating plaintiffs' claims, the notices make no mention of whether any consideration was given to such factors as age, education, prior work history, etc. These factors are part of the well known "grid" analysis used by the Social Security Administration, granting or denying SSI benefits. With a boilerplate notice, a plaintiff is consigned to speculate as to how to satisfy the MRT in challenging the termination. A plaintiff would not know whether the termination was caused by insufficient medical information, or some utterly different alleged problem that had no connection to a medical issue. At least one plaintiff (Rodgers) appears to be the victim of a baseless denial of benefits.

Had DHS notified each recipient of the change in the program and the effect on him or her, and had it required each recipient to come into the agency and fill out a new application, due process requirements would have been met. Rather, the agency did not require each applicant to come in because they blanketly decided that a large number of individuals "simply would not come in to reapply."[4]

As a matter of law, the Court finds that each notice sent to each plaintiff whose GPA benefits are to be discontinued because they are not found to be disabled must contain a concise delineation of the particular

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[4] Supplemental Affidavit of Kate Jesberg, p. 4, ¶7.

factors that compel termination. Good examples would be: a finding (1) that the recipient's last known pertinent injury has healed or (2) that the recipient's age, education and work history shows that he or she can still be employed despite the existing illness or disability. A notice is deficient if it merely recites conclusory language that the person is not "disabled."

Pre-termination Hearing Requirement

As a matter of law, this Court finds that prior to terminating GPA benefits for plaintiffs in the class, the defendants must provide a pre-termination hearing. Benefits should continue pending the outcome of the hearing. In reaching this conclusion, the Court considers the three factors enunciated in *Mathews*.

1. *The Private Interest at Stake*. GPA is a needs based program available to disabled adults who are unable to work and who lack alternative income or resources. As in *Goldberg*, GPA provides the sole means of cash support without which recipients lack the means to survive. The potential for extreme deprivation, posed by the termination of such benefits requires a pre-termination evidentiary hearing.

2. *The Risk of Erroneous Deprivation*. Without the benefit of pre-termination hearings, eligible recipients may be improperly deprived of GPA benefits. As noted above, there has been at least one instance where for recertification purposes the recipient's doctor stated that he was permanently disabled, yet he was prohibited from receiving benefits because he was found not disabled. If a pre-termination hearing had been held, plaintiff Rodgers could have presented his doctor's testimony as to his disability, and the agency would have had to explain how the MRT found him not disabled.

If the District knows that a plaintiff may request a pre-termination hearing, then the MRT will more likely review all pertinent materials prior to making their

decision. In other words, medical review teams will be under a more enforceable obligation to make sure that their decisions are accurate and they more likely would grasp what is expected of them.

3. *The Public Interest.* Public interest favors ensuring that citizens of the District are not deprived of their ability to survive utilizing the small amount of funds they receive as GPA benefits, without the opportunity to contest their eligibility for public assistance. "The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." *Goldberg* at 265.

Another argument the District puts forth is that plaintiffs are not entitled to due process protection because the District Council has by statute created a "new program." The District states that "plaintiffs have no right to procedural due process under the Fifth Amendment since the District Council has by statute simply implemented an across the board change in eligibility for which a hearing and individual notice were not required." Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 8-9. Additionally, the District states that once the recipient's certification period ends, he or she must "reapply under the new program" and establish that he or she meet the new criteria.

The District's argument fails for a number of reasons. As a threshold matter, individualized medical determinations are a false analog to an "across the board change." Moreover, there are no practical methods of the creation of a "new program." There are several telltale signs that there is no "new program."

First, no notices were sent to GPA participants that the existing program was "ending" or that it was being replaced by some other program. In fact, after July 1,

1991, GPA recipients were taken through the same recertification process that had been utilized in the past.[5] Additionally, the same recertification forms were used as had been utilized in the past.[6] GPA recipients and their doctors never received a notice from DHS indicating that they were to be evaluated under the new medical eligibility criteria.

Second, after the new legislation went into effect, there was only one real difference in the recertification process: persons found not to be "disabled" were immediately denied benefits.

Third, there was no published "deadline" date for recipients to apply to the allegedly "new program."

Fourth, there was no announced start-up date advertised to entirely new applicants or to the public at large. While it is true that the notice or the change in the eligibility criteria was published in the D.C. Register, most if not all recipients were unaware of the change in the medical criteria. Additionally, because of lack of education, varying literacy levels, etc. of this very needy population, it cannot be assumed by the District that this group would keep itself abreast of changes of this magnitude.

The only meaningful modification to the existing GPA program was imposed totally by surprise upon the recipients. If anyone in the executive branch intended that the recipients "apply" to a "new program," it would have been logical and consistent for those persons to have been told about the change in some timely manner. In this fashion, recipients who desired to maintain their benefits would have had actual lead time in which to prepare the necessary informational package that addressed the entire range of factors beyond merely a

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[5] Hicks Deposition, pp. 67, 85-86, 88.

[6] Hicks Deposition, pp. 52-52.

doctor's statement. After all, when the council analogized the GPA standard to the SSI standard, the new law suddenly required recipients to be prepared to present arguments on such issues as their prior work history, etc. These factors are part of the well known "grid" of factors that compose a decision on SSI benefits. This information had never been required before in our local GPA program.

The manner in which the plaintiffs were taken by surprise on a wholesale basis does not support the District's contention that the procedure for the changeover was planned to eliminate as many "hurdles" as possible for the recipients. It is worthwhile to note that the executive branch purposely decided to deny predetermination hearings to the plaintiff class. This was not an accident. In her Supplemental Affidavit, contained in the record of this case, Kate Jesberg states,

> The mere fact that the agency did not require each applicant to come in and fill out an application was for the convenience and benefit of both the agency and the applicants. Had DHS implemented the statute in such a manner initially, it is very possible that a large number of individuals simply would not have come in to reapply. This would have been to the detriment of a large number of applicants.

See footnote 4, *supra*.

It appears that the District believed that this approach was beneficial to the recipients. The denial of pretermination benefits, in retrospect, was not regarded by the plaintiff class to be a favorable gesture. It is difficult to support the notion that recipients who rely upon these benefits for such basic needs would not bother to arrive personally for a hearing in order to keep receiving the money. The intense level of outrage expressed in the plaintiffs' affidavits of record are more than sufficient to show that the District's tactic was not at all helpful. Moreover, it is striking that the defendants erected this

automatic cut-off system partly for their own convenience.

For all these reasons, the plaintiffs are highly likely to prevail on the merits issues of whether they are entitled to a constitutionally adequate written notice and a pretermination hearing.

B. Irreparable Injury Analysis

The Court concludes as a matter of law that in the absence of a preliminary injunction, the plaintiffs as a class, and in varying ways, are likely to suffer irreparable injury.

The irreparable injury would arise in the following manner. Members of the class can and will suffer a withholding of basic resources for daily living. Interruption of these benefits is not a deprivation or diminution of discretionary income.

This particular class of plaintiffs embraces persons who, by definition, are receiving this public entitlement because they do not have any other means of providing for basic necessities. This is the very purpose of the GPA program.

These benefits are clearly designed to be a last resort of local public assistance for persons who have virtually no other funds for ordinary, daily subsistence and who are otherwise awaiting federal SSI benefits. Furthermore, the provision of GPA benefits is not a secondary matter of providing consumer purchasing discounts, nor are those funds analogous to any other form of indirect, less critical help. Thus, the loss of these benefits would have an unmistakable, drastic quality on an individual level.

Generally, courts look with disfavor upon requests for injunctive relief where the alleged irreparable harm is loss of money that can be repaid after successful litigation. *See, e.g., Sampson* v. *Murray*, 415 U.S. 61 (1974).

The harm to be suffered must be truly irreparable and not "merely substantial or serious." *A.O. Smith Corp.* v. *Federal Trade Commission*, 530 F.2d 515, 525 (3d Cir. 1976).

The practical focus of the injury issue, more precisely however, is whether the plaintiffs will suffer "injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits." *Canal Authority of Florida* v. *Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). In other words, the question is whether the type of harm could ever be redressed (or whether plaintiffs could be made whole) by winning their case in the courtroom.

Applying this approach to the instant facts, this Court finds as a matter of law that the type of injuries sustainable by the plaintiffs cannot be redressed by an ultimate success in court at some later time. Obtaining the right to a hearing months later or years later is no substitute for the loss of independent living today.

The inability of a person to provide himself or herself with daily food, shelter and vital medical supplies is an immediate crisis. The character and severity of the crisis is all the more important when the people involved are at least "incapacitated" by some physical disability or illness that already has prevented them from working or living otherwise self-sufficient lives.

Any analysis of "irreparable injury" must be placed in the context of the existence of a class of plaintiffs. The Court has already certified this case to be a class action because of the obviously large number of persons who are affected.

It is useful to recall that the disputed termination process operates against vast numbers of GPA recipients on a rolling basis, *i.e.*, at the conclusion of a person's current certification period. Because of the passage of time, it would appear that more than six months has elapsed

since the implementation of this termination system. Theoretically at least, if the terminations are taking effect upon the conclusion of six-month certification periods, the passage of six months time should signal the end of the issuance of notices.

If it is correct that all potential class members have now been reached by the post-July 1, 1991 termination policy, the class is now closed at its largest size. Thus, there is now the largest possible universe of people who could be caught without any means of obtaining daily subsistence.

The Court notes parenthetically that the Court has not been apprised that in fact the mailing of notices has ceased. Thus, the issue of ordering their cessation is still a live aspect of the controversy.

While some members of the class may be able to seek temporary shelter with relatives, this is not a long-term or satisfactory solution. There is more than a marginal risk of swelling the homeless population, a risk that is somewhat avoidable through the issuance of a preliminary injunction.

As a principle of law, it is logical and reasonable to find, as this Court does, that loss of a person's home can be, under certain conditions, an irreparable injury. *See Brown* v. *Artery Organization, Inc.*, 654 F. Supp. 1106, 1118 (D.D.C. 1987). The present conditions justify a finding of a risk of irreparable harm.

In *Brown*, tenants of an apartment complex brought suit against their landlord alleging that discrimination had occurred in violation or the Fair Housing Act. A preliminary injunction was issued by the United States District Court.

In assessing the danger of irreparable injury the District Court found that such injury had been established because the plaintiffs were low-income persons who would otherwise be required to relocate, most likely to

substandard housing. Still others might become homeless. *Id.* at 1118. Under these circumstances, this Court, like the District Court in *Brown*, finds that it is imperative to preserve the status quo for the plaintiffs prior to a final decision on the merits of their claim.

At an earlier stage of this litigation, the defendants argued that the named plaintiffs actually could claim no major injury. Defendants suggested that one of the named plaintiffs ultimately has been found to be "disabled" under the new standard and that the remaining three plaintiffs previously had been denied SSI benefits. Indeed, in certifying the class this Court specifically took into account the probability that the universe of persons who are adversely affected by the new legislation would be a dynamic group of persons, each with a slightly different fact pattern from the other, on any given day.

For example, there are sub-groups of persons who will suffer irreparable injury in various stages, either (1) because their GPA benefits have been terminated and no recertification has been granted; or (2) because they have been recertified as "disabled" but lost benefits in the interim, or (3) because they were found ineligible for SSI benefits after termination but lost GPA benefits while awaiting the SSI decision, or (4) because they finally did qualify for SSI benefits but lost GPA benefits while awaiting the SSI decision.

In certifying a class, this Court determined that there could be other sub-sets or permutations as well.

It is possible that a person who might qualify for SSI benefits 180 days from now could nonetheless become homeless because of the intervening loss of GPA benefits. It is not accurate to assume that irreparable injury could only occur to persons who are unsuccessful at all stages of their administrative sojourn. Moreover, serious illness or death could occur at any time if a person

simply does not have access to medicine or other critical medical supplies even for a few days.

On balance, for the class as a whole, this Court does not regard the risk of irreparable injury to be a close case. If such injury ultimately occurs even to a small number of persons in the class, the character of the injury is still extreme. The law does not require that death, or serious illness, or homelessness occur with each and every member of the class, in order for a preliminary injunction to be deemed appropriate. Preservation of the status quo can be accomplished through a preliminary injunction. Preservation of the status quo is necessary in order to forestall actual irreparable injury, including serious illness, loss of homes, or even death. Prevailing on legal principles at a later point in the lawsuit or on appeal is not sufficient, as a legal remedy, to address the potential harm facing the plaintiff class.

C. Balancing the Equities

The third prong of the injunction analysis requires the Court to balance the equities that are at stake for each party. Where the District is concerned, it stresses the importance of the financial impact of having to pay benefits to plaintiffs who are awaiting the outcome of appeals from their terminations. The plaintiffs, in turn, urge the Court to weigh the equities in favor of preserving their means of maintaining their ability to pay rent and otherwise obtain basic necessities of life. Each side has raised substantial concerns and the Court has examined them closely.

The Court discerns two aspects of the equitable debate. First, the Court must assess how the equities affect an injunction against further terminations without fair hearings—and a related order mandating the temporary resumption of benefits in the interim. Second, as an entirely separate matter, the Court must not leave dangling the issue of whether a preliminary injunction

should include an order directing the District to pay all benefits that have been withheld, retroactive to the date of the disputed termination notices. The parties should recall that this demand is indeed made in the complaint in this action. The Court treats these issues separately as follows.

1. *The Temporary Resumption of Benefits*. The District strenuously argues that there will be significant, negative impact upon the District's budget if the Court should order temporary restoration of benefits. Evidently, in assuming that the new legislation would eliminate such payments, the District gave priority to other types of entitlement programs in lieu of these payments to incapacitated persons. This theme is reflected throughout the District's pleadings and in oral argument.

In its proposed findings of fact, defendants refer to certain details in the Affidavit of Kate Jesberg and emphasize that restoring benefits will be expensive. Defendants argue that returning benefits "alone will cost in excess of one million dollars. In addition, projected savings of over five million dollars have already been earmarked for another needs program, Aid to Families with Dependent Children (AFDC). As such, granting a preliminary injunction will severely impact on the City's resources and ability to serve the needs of other at risk members of the public."

The Court can well assume, without further proffers, that expenditures for any entitlement program will be significant. Moreover, the Court fully recognizes that the District is in a fiscal crisis and that the Council passed the new legislation specifically as a means of conserving funds in the near future and beyond.

Without any doubt, the Council has undisputed authority to enact substantive changes in medical standards for the type of benefits at issue here and the reasons for doing so, cited in the legislative history, are well within the Council's authority. The intent of the

Council, as set forth in the Committee Report on this bill, was to eliminate the expenditure of municipal funds for a certain class of potential applicants, *i.e.*, persons who are incapacitated temporarily but who are not actually "disabled" as defined for federal purposes. This justification for the new law, albeit subject to great outcry, is within the Council's authority and this cannot be a topic of debate in this lawsuit.

For purposes of this Court's decision on the injunction, it suffices to say that the impact of a preliminary injunction surely will be a financial burden to the District.

Nevertheless, the realities of this burden can be placed in useful perspective by recalling that a preliminary injunction is a temporary measure only. The District's financial protestations must be examined more closely.

In her first of two affidavits, filed on January 16, 1992, Kate Jesberg attempted to set forth the actual costs of "negating" the changes wrought by the new legislation. In other words, she purports to establish a dollar figure that would represent the cost of paying benefits while recipients are pursuing administrative appeals of their terminations. In addition, Jesberg offers a set of figures to show the projected budgetary savings that are anticipated from the exclusion of incapacitated people from the GPA program. These amounts represent the sum of money that the District hopes to save by ending benefits to the plaintiff class.

The most pertinent sum in her affidavit is the amount of money cited as the cost of maintaining benefits while plaintiffs appeal their terminations. On this subject, Jesberg's assertions can be analyzed as follows.

First, she states that the total cost of paying the disputed benefits during Fiscal Year 1992 and Fiscal Year 1993 would be "approximately $13.9 million." More specifically, she states that in Fiscal Year 1992, the "full savings are not realized" because "virtually all GPA

recipients, as of October 1, 1991, continued to receive some GPA payments through at least some portion of FY92." In other words, the savings are expected to "increase as time progresses." She estimates that "to date savings are approximately $l. million, with greater savings achieved as the fiscal year continues."

Second, Jesberg concludes without elaboration that the "administrative expense associated with negation of the GPA changes would be approximately $1.8 million in staff costs and approximately $500,000 in indirect overhead and support costs, on an annual basis." Apparently, Jesberg assumes that "administrative costs" would include the cost of calculating retroactive benefits, as well as the cost of issuing current checks.

It is also worth noting that there must be similar, unanticipated staffing and overhead costs in addressing a sudden surge of administrative appeals and inquiries from the systematic termination of benefits. This is a cost that the District apparently was willing to assume and which should have been expected, given the drastic result of the new legislation. This point is ignored and not distinguished away or compared in the affidavit.

For two reasons, the Court is convinced that these initial figures do not provide a sufficient basis upon which to deny a preliminary injunction on the putative theory that it is simply too expensive to restore benefits temporarily.

First, the key issue before this Court is the issuance of a preliminary injunction that would act purely as a stopgap measure pending the outcome of this litigation. With able counsel on both sides of this issue, the Court expects that this litigation will proceed with alacrity. Moreover, it is possible that the District will appeal the issuance of a preliminary injunction and, if so, the Court of Appeals will not waste time in providing its opinion on this important matter. In either event, there will not be an inordinate period of time that will elapse before

the legality of the terminations will be decided with finality. Thus, the enormous costs predicted, inferentially, most likely will not be borne by the District as a result of the issuance of a preliminary injunction. There is no reason to assume that a preliminary injunction would be in effect for one and a half fiscal years.

On this account, the cost projection for a two-year resumption of payments is not relevant. It would have been relevant, however, for the District to have proffered the costs of temporary payments for exemplary periods such as three months or six months. Defendants did not do so, but simply presented the worse case scenario, illustrated in the broadest and most alarming terms. The most useful figures, not provided by anyone, would have encompassed the cost of restarting benefits in terms of weeks or a few months, rather than years.

Second, the amounts indicated as costs of restoring benefits seem to be predicated upon at least one assumption that may not be valid. For example, the District probably is basing its estimates on the assumption that **everyone** who was originally receiving benefits will still be entitled to them (or demanding them) at this time, and that all of the original recipients are still alive. The District does not appear to recognize, in this analysis, that even under normal circumstances a certain number of people will disappear as claimants. For example, people do become deceased. They may drift to some other part of the metropolitan area. Hopefully, some may obtain employment or otherwise resolve their need for benefits. Thus, the present number of affected persons who might benefit from an injunction is probably lower now than in July, 1991. At best, Jesberg's cost estimates are not sufficiently focused to be pivotal in denying a preliminary injunction. In the context of granting a temporary remedy, this Court exercises its discretion as a fact-finder to give little weight to these proffered facts.

The competing equities, of course, are to be found in the personal effect upon the plaintiffs of the denial of an injunction. Here, the court recalls its factual findings about the practical impact of the new law upon the plaintiff class. The Court gives due consideration to the reality of how a denial of a preliminary injunction would operate.

Its denial would mean, to some plaintiffs, the difference between having shelter and quickly becoming homeless, or having medical necessities today (when they are needed) and having none. For those persons who would be caught with no benefits at all, one might speculate that they could obtain certain help from the Medicaid program in the future. However, it is impractical to assume that this is any genuine, immediate relief to a person who has present-day needs that must be addressed without going through yet another bureaucratic application process. The Court presumes that the Medicaid program, like Social Security, does not issue monies or eligibility cards on a walk-in basis. No one has suggested otherwise.

Ultimately, then, this Court elects to place a higher priority on the personal detriment that would flow from the denial of a preliminary injunction. The temporary cost to the District is not an undue price to pay for vital benefits of the sort that have been interrupted here. The nature of the benefits, *i.e.* survival funding, is a factor that carries great weight with this Court in balancing the equities in this case.

2. *Retroactive Payments*. For the following reasons, this Court balances numerous equitable factors in concluding that *no retroactive benefits* should be ordered as part of any preliminary injunction.

First, the Court is duly mindful of the District's well known financial difficulties. Indeed, it would be particularly burdensome upon the District to order at this juncture any sort of retroactive payments of benefits for

the entire class or even for a part of the plaintiff class. It is worthwhile to draw a distinction, as this Court does, between two different aspects of the burden upon the city. One burden is the cost of restarting payments to plaintiffs who are still awaiting the results of an appeal of their terminations. A separate burden is the cost of a large, wholesale payout of lump sum checks that are retroactive to the issuance of termination notices.

The "restart" checks should not require historical research and calculations to determine the amount due. This is clearly not the case with retroactive checks, and thus there is ostensibly a greater administrative task involved. More importantly, the Court is concerned that such a procedure would engender perhaps further individual disputes and inquiries that would impede the District's practical ability to expedite the "restart" payments. Obviously, "restart" checks should have priority. Presumably, it is less difficult simply to implement current disbursements at the last known level of payment for each particular plaintiff.

Finally, it does not seem that preservation of the status quo should require retroactive payments. The sum of money to be paid by the District would be greater, the merits of the case are not yet finally decided, and retroactive payments might be owed to persons who are no longer to be found in the jurisdiction. For these reasons, it is not appropriate to saddle the District with this responsibility at this point in the litigation.

The District has noted another consideration that may impinge upon the equity analysis. Defendants alleged in their proposed factual findings that one of the named plaintiffs has provided misleading personal information on documentation submitted to DHS. The District's concern is that she has not truthfully divulged her household circumstances so as to appear to be more needy than she actually is. Obviously, the District should pursue allegations of fraud under the normal procedures for doing so.

If this charge amounts to actual fraud, the Corporation Counsel should take appropriate action without delay. But disparate accusations of this kind should not serve to trump the rights of the other class members. This situation, even if true, should not serve to tip the scales in favor of denying injunctive relief to innocent, honest persons who are also members of the plaintiff class. The Court will address the District's allegation in a separate order to show cause why this individual should not be removed as class representative. Class representatives must be persons whose integrity is not compromised.

In sum, this Court finds as a matter of law that the equities are best balanced in favor of the issuance of a preliminary injunction. Preservation of the status quo is necessary in order to prevent actual, irreparable injury to the class as a whole. Winning the lawsuit on legal principles cannot redress the harm that can occur today, prior to a final decision on the merits. More harm will flow to the plaintiffs in the absence of a preliminary injunction than will result to the defendants if it is denied.

As far as payments are concerned, the injunction shall be limited to an order requiring the resumption of benefits to all members of the plaintiff class who are still awaiting a final decision on an administrative appeal of their termination.

D. The Public Interest Factor

The fourth major topic of consideration is the public interest, as it is reflected in the contentions of all parties. The Court concludes as a matter of law that the public interest favors the issuance of a preliminary injunction more so than the denial of such a remedy.

The District contends that the public interest is the conservation of funds. Defendants urge this Court to deny injunctive relief simply because it would be costly

to the government to allocate staff time and resources to the hearing process.

The fiscal impact is no secret, but no one has suggested that the daily operations of the Government are in fact jeopardized in the same fashion as the plaintiffs are facing a deprivation of funds for daily human necessities. This is a relevant contrast.

The Court's interpretation of the facts is that the ultimate public interest lies in stabilizing the basic means of economic existence for citizens who are verifiably unable to work and who are in the midst of asserting constitutional rights. This indeed is the whole purpose of having a GPA program and, thus, the statute itself is an expression of the public's fundamental interest. As much as the Council desires to structure the GPA program in the most fiscally conservative way, the Council has never intimated that the program should not exist or that it is not needed.

In fact, the legislative history accompanying the bill reflects that the Council was plainly aware of the importance of the GPA program and equally aware of the significance of the change in medical criteria. The bill was passed as an apparently hard choice, after a candid recognition of the financial crisis facing the District. See Report Of The Committee On Human Services On Bill 91-159, District Of Columbia Public Assistance Act Of 1982 Budget Conformity Amendment Act Of 1991 (April 25, 1991).

Unfortunately, this Committee Report is devoid of any discussion about procedural due process. The Report does not reflect precisely why the Council decided to eliminate the right to a pre-termination hearing for this discrete class of recipients. There is no statement, for example, that it would be too costly to hold hearings (although in these circumstances this is not a constitutionally sufficient justification). Neither is there a statement that the Council affirmatively believed that

such hearings are not legally required. The legislature simply decreed that the benefits would be cut off by a system of automatic termination at the conclusion of a recipient's current certification period.

Assessing the controversy from another perspective, however, there is a clear public interest in preventing more and more people from becoming homeless. Moreover, some members of the plaintiff class may already live in homeless shelters and the denial of benefits may only retard their ability to leave these circumstances and begin to provide for their own housing.

It is a matter of common knowledge that public agencies and private sector organizations are constantly struggling to keep up with increasing demands for services for the homeless population. Accordingly, it is not in the community's best interests for the Court to exacerbate this problem, potentially, by denying a preliminary injunction in this case.

IV. *SUMMARY*

Upon the foregoing findings of fact and conclusions of law, this Court has determined that a preliminary injunction against the defendants must issue because the plaintiffs have demonstrated (1) that they are substantially likely to prevail on the merits, (2) that temporary injunctive relief is necessary to prevent irreparable injury to members of the class, (3) that the equitable factors are balanced in favor of the plaintiffs, and (4) that the public interest is served by the issuance of a preliminary injunction. Overall, common sense compels the issuance of the injunction as a temporary measure.

The reasons cited in this opinion constitute this Court's basis for the issuance of the accompanying Preliminary Injunction, to remain in effect pending a final decision in

this action. This opinion is incorporated by reference into the Preliminary Injunction.

/s/ Cheryl M. Long
CHERYL M. LONG
Associate Judge

APPENDIX D

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

BIVENS LITTLE, *et al.*

v.

SHARON PRATT KELLY, *et al.*

91 CA-14119
Calendar 13
Judge Long

OPINION AND ORDER

Following the entry of a preliminary injunction on March 9, 1992, this action is now before this Court for rulings on Defendants' Motion for Summary Judgment, as well as Plaintiffs' Motion for Partial Summary Judgment and Motion for Supplemental Preliminary Injunction. This action was formerly captioned *Elnora Brown, et al.* v. *Sharon Pratt Kelly, et al.*, but there has been a substitution of the lead named plaintiff in this class action.

The major issues in this action have been substantially briefed in the litigation that resulted in the issuance of the preliminary injunction. Nonetheless, in the more recent pleadings the parties have provided additional points and authorities and, in some respects, have raised additional issues.

In essence, this case is a class action that was filed to halt the interruption of certain general public assistance (GPA) benefits to citizens of the District of Columbia. The focus of the case is the asserted constitutional deficiency of the manner in which the District of Co-

lumbia has implemented 1991 legislation that changes the criteria for these benefits. The term "implemented" refers to executive branch action as well as a specific statutory mandate.

Lest there be any doubt, this case does not involve a challenge to the legislature's right and power to make changes in eligibility criteria. Rather, the real issue in this case is the lack of a pretermination hearing (denied by statute) and adequate notice of termination to the affected recipients.

Essentially, the plaintiffs were all recipients of public assistance benefits because of their medical inability to work. The 1991 law now requires them to demonstrate that they are "disabled" and not merely "incapacitated." Thus, the 1991 statute established new criteria under which benefits were to be provided to unemployed persons who are medically "disabled" while they are awaiting a decision from HHS as to their applications for federal disability benefits (known as SSI payments). The local benefits serve as a stop-gap measure to assist such persons with survival funding while they seek more substantial financial help from the federal government. The statutory language in issue is quoted and discussed in more detail in the Memorandum Opinion issued by this Court on March 9, 1992.

All of the plaintiffs are persons who were terminated from GPA benefits without any hearing and without an adequate notice as to the specific basis of the administrative finding of non-eligibility under the new law.

Based upon the following analysis, this Court finds (1) that partial summary judgment must be granted in favor of plaintiffs, (2) that the action cannot be dismissed, and (3) that the Court must issue a permanent injunction barring termination of benefits without a due process hearing and constitutionally adequate notice of termination.

I. *FACTS NOT IN DISPUTE*

In a 57-page Memorandum Opinion of March 9, 1992 (hereinafter "the Memorandum Opinion"), this Court summarized the procedural history of the case and entered detailed Findings of Fact and Conclusions of Law, supporting the issuance of the preliminary injunction. This Court herein incorporates by reference that entire memorandum opinion, especially the Findings of Fact for purposes of summary judgment issues herein.

The Court's Findings of Fact includes those facts that the Court determined are not in dispute and which are amply supported with citations to record evidence. There is no need to repeat all of these factual details herein.

The effect of the preliminary injunction was to order the District temporarily to reinstate the payments of benefits to the members of the plaintiff class who are still awaiting a final decision on their administrative appeals of their terminations.

To address the pending motions of all parties, it is most useful to recapitulate the issues that are raised in each motion and to set forth separately the Court's rulings on each legal concept or contention.

II. *LAW ON SUMMARY JUDGMENT AND PERMANENT INJUNCTIONS.*

The law applicable to motions for summary judgment is well established. It is widely understood that summary judgment "should be granted to the movant unless the opposing party offers competent evidence admissible at trial showing that there is a genuine issue as to a material fact." *Nader* v. *de Toledano*, 408 A.2d 31, 48 (D.C. 1979). "In practical effect the rule [Rule 56(c)] requires more of the opposing party than the mere demonstration of disputed factual issues." *Id.*, citing

Bushie v. *Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972). This means that mere argument will not suffice.

Admissible evidence refers to sworn answers to interrogatories, deposition testimony, sworn affidavits, and authenticated documents that would be admissible.

In the instant case, the parties have provided ample factual material from which the Court has made findings as to the basic course of events. In this particular case, those facts that the Court regards as "material" are undisputed and they are recited in detail in the Memorandum Opinion with citations to the record.

Where permanent injunctions are concerned, the Court must perform most of the usual four-pronged analysis that is prescribed for the issuance of a preliminary injunction, save for one matter. As the plaintiffs point out, the key difference in the Court's legal conclusions is that in order to issue a permanent injunction the Court must decide that the plaintiffs arguments on the merits are superior to the arguments of the defendants. It is no longer a matter of whether plaintiffs are substantially likely to prevail on the merits. They must actually prevail and convince the Court that their position is correct on the underlying legal controversy. *See Amoco Production Co.* v. *Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987); *Durango Herald Inc.* v. *Riddle*, 719 F. Supp. 941, 946 (D. Colo. 1988); *Current-Jacks Fork Canoe Rental Ass'n* v. *Clark*, 603 F. Supp. 421, 425 (E.D. Mo. 1985); *National Wildlife Federation* v. *Andrus*, 440 F. Supp. 1245, 1256 (D.D.C. 1977) (granting permanent injunction, citing *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958)); *see also* 11 C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 2941 (Rule 65) page 355 (1973).

III. *THE PENDING MOTIONS*

A review of all of the above motions reveals that some issues are anticipated by an opposing party in pleadings that are not necessarily oppositions to a particular motion. In other words, the issues are interwoven among all of the pleadings in some fashion. Without repeating the minutiae in all of the motions, the following substantial issues can be culled from each of them.

Plaintiffs' Motion for A Supplemental Preliminary Injunction. In this pleading, the plaintiffs seek a modification of the preliminary injunction for the purpose of adding a subgroup of class members to the particular plaintiffs who are entitled to a temporary resumption of benefits. The subgroup includes plaintiffs who, after receiving termination notices based upon non-disability determinations, "reapplied" for the GPA program instead of appealing their terminations.

Because the Court is now ruling upon the matter of a permanent injunction, the Court must define the final participants in the beneficiary class.

Defendants' Motion for Summary Judgment. The defendants contend herein that the case should be dismissed because: (1) the statute in question does not violate any due process rights of the plaintiffs; and (2) the notice that was sent to the plaintiffs was legally sufficient. Also in this pleading, the District urges this Court not to order retroactive payments to any class members, even if the Court rules against the defendants on the underlying merits.

Plaintiffs' Motion for Partial Summary Judgment. Many matters are embraced in this motion. They are: (1) whether the preclusion of pretermination hearings in the statute is unconstitutional and whether notices provided to the plaintiffs were legally sufficient under applicable case law; (2) whether "recertification" under the old benefits standard is analogous to "reapplication"

for benefits under the new standard; (3) whether reinstatement to the receipt of benefits is mandated as a permanent remedy; (4) whether the permanent remedy to be ordered by this Court should cover persons who were terminated subsequent to the issuance of the Preliminary Injunction; (5) whether the Court should impose upon the defendants a detailed order requiring certain corrective measures to insure compliance with due process.

The term "partial" summary judgment refers to the fact that there is one cause of action in the complaint that remains for trial and which cannot be resolved by way of summary judgment. One of the allegations in the complaint is that defendant should be ordered to reinstate benefits to the plaintiffs, because those plaintiffs who received termination notices did not actually have their cases reviewed under the new criteria mandated in the 1991 statute. See Complaint at paragraphs 48, 74, and 75. In a separate cause of action denominated as Count V of the Complaint, plaintiffs seek a declaratory judgment that "in declaring that plaintiffs were not disabled, defendant did not apply SSI criteria, and thereby violated D.C. Code Ann. § 3-205.42, as amended by D.C. Law 9-27, § 2(e)." This is one of several theories upon which the plaintiffs argue that they are entitled to reinstatement of their benefits.

More specifically, the plaintiffs allege that the defendant never actually performed a comprehensive review of client cases in a way that is analogous to the Social Security System method for determining disability. This system, the plaintiffs contend, is far more extensive than a simple physician's opinion that a claimant is "disabled."

This issue must be tried because it is still disputed. The defendants will not concede or stipulate that DHS personnel did not actually perform full SSI evaluations on **the terminated plaintiffs** or that they **applied all such criteria** to the case files of such plaintiffs. A trial

must be convened in order to afford the defendants their opportunity to defend against this allegation.

To understand the need for a trial on this Count, a brief description of the SSI scheme is useful. The 1991 District of Columbia statute that is in dispute here requires the District to adopt this very same set of standards and they are complex.

In the last two decades, a vast body of case law has developed that describes and interprets the Social Security Administration standards for determining eligibility for disability benefits. For example, the five-step sequential evaluation process is explained in *Pagan* v. *Bowen*, 862 F.2d 340, 342 (D.C. Cir. 1989).

The final stage of the SSI application review involves an analysis of the current job market under regulations known as the Medical-Vocational Guidelines, commonly known as "the grids." Many subjective factors can come into play in granting or denying benefits, particularly since the grids do not take into account nonexertional impairments. *See*, *e.g.*, *Smith* v. *Bowen*, 826 F.2d 1120 (D.C. Cir. 1987) (arthritis and allergic exposure); *Fulwood* v. *Heckler*, 594 F. Supp. 540 (D.D.C. 1984) (alcohol abuse).

The focus of the remaining trial issue will be the proof of the actual invocation of this comprehensive review and evaluation process prior to the terminations of the plaintiffs.

Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment. To enlarge the matters briefed in their Motion for Partial Summary Judgment, plaintiffs have filed a supplemental pleading that sets forth several additional subjects: (1) the addition of further transcript testimony of Holloway Wooten, the Chief of the Office of Fair Hearings for the Department of Human Services; (2) the issue of whether an opinion by another judge of

the Superior Court in *Quattlebaum* v. *District of Columbia*, has any applicability to this Court's prior ruling on the Preliminary Injunction; (3) whether defendants are correct in implying that this entire lawsuit can be mooted simply by the issuance of new termination notices advising all GPA recipients to come in and reapply for benefits; and (4) the significance of sections of the DHS General Public Assistance Handbook on the issue of whether recertification under the old benefits standard is analogous to "reapplication" under the new standard.

IV. *ANALYSIS OF THE ISSUES*

As follows, this Court treats all of the matters noted above either separately or in a combined fashion, first dealing with the constitutional issues.

Due Process Violation in the Statute. The statute in issue is published in the Code at 3 D.C. § 205.53(c) and a copy of that law is appended to the previous Memorandum Opinion of this Court. That statute provides that

> benefits shall not be continued beyond the effective date of the termination if the sole basis for the individual's appeal of the termination is the failure to meet the disability standard in section 542. (D.C. Code §3-205.42).

This Court has fully reviewed the entire presentation of points and authorities cited by all counsel on the question of whether the statute in issue violates the Fifth Amendment of the Constitution. This Court concludes as a matter of law, as it did preliminarily, that insofar as this portion of the statute mandates the cut-off of GPA benefits without a pretermination hearing, it is unconstitutional.

In reaching this conclusion, this Court relies upon the same authorities and analysis found in this Court's Memorandum Opinion and it is hereby incorporated by reference in its entirety in the instant opinion. The

defendants have cited nothing to this Court that convinces this Court to reverse its original view about the constitutional infirmity of this part of the statute.

To be sure, this Court is not invalidating the entire statute, but merely one of its constituent parts that serves to implement the eligibility requirements. There is no constitutional infirmity that this Court can discern in the Council's fundamental act of changing those medical requirements. Thus, the balance of the statute is unaffected by this opinion.

The statutory language quoted above commands the Department of Human Services to cut off benefits automatically, if the sole basis for an appeal from termination is the recipients' failure to meet the new medical criteria for eligibility.

The Court must reject the District's bizarre argument on page 4 of its Opposition to Plaintiffs' Motion for Partial Summary Judgment, where defendants contend that plaintiffs "have never actually argued that D.C. Law 9-27 is unconstitutional." Defendants charge that the plaintiffs are being "disingenuous" to submit a proposed order to this Court that includes a proposed finding that this law is unconstitutional.

The defendants are wrong. At every stage of this lawsuit (including the complaint), the plaintiffs have argued that one specific part of the statute is unconstitutional, *i.e.* the passage quoted above herein. Moreover, this Court also quoted this same statutory language indicating that this is "the provision of the new law that is subject to constitutional interpretation by this Court. . . ." Memorandum Opinion, at page 10. Indeed, there is simply no way in which to grant relief to the plaintiffs on the pretermination hearing issue, except by invalidating the above-quoted part of the statute. This is because the denial of such hearings is commanded by the 1991 law. The denial of pretermination hearings is not a creature of personal discretion by employees of the

executive branch, nor was it a matter of temporary policy of any defendant herein.

Finally, this Court perceives no basis for departing from its prior ruling that the legislated change of medical criteria was not a "mass change" that affected all plaintiffs equally and which would obviate the need for an individualized pretermination hearing. Thus, this case is not controlled by *Atkins* v. *Parker*, 472 U.S. 115 (1985) for the reasons explained in the Memorandum Opinion.

The Relationship Between Recertification and Reapplication. The District has always argued that in setting up what it claims is a "new program" of disability benefits, the recipients under the "old program" should be regarded as brand new applicants. Thus, the Defendants argue, if they are brand new applicants there is no legally cognizable right to the continuation of payments because there is nothing in existence to continue. The right to continuation of welfare payments is a property interest to a statutory entitlement that clearly invokes due process rights. *See Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and its progeny.

This Court has already found that in offering the terminated plaintiffs the option of "reapplying" for benefits under the so-called new program, this gesture actually meant nothing more than affording them a "recertification" under the same program but with new criteria. Other than the imposition of the more stringent medical criteria, there is no new program. See Memorandum Opinion at pages 32-36 (the "public interest" analysis) and the corresponding evidence cited in the Findings of Fact.

In its opposition to Defendant's Motion for Summary Judgment on this issue, the plaintiffs correctly point out that under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), due process is implicated when an individual's property interest in welfare benefits is adversely affected—and certainly this principle applies when such benefits are

cut off. *Id.* at 332. The holding of *Mathews* applies in any situation in which the state or local government has, through its conduct, created an expectation of some public entitlement. *See, e.g., Williams* v. *Barry*, 490 F. Supp. 941, 945 (D.D.C. 1980); *Williams* v. *Barry*, 708 F.2d 789, 792 (D.C. Cir. 1983)(citing *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972)).

The Court agrees with plaintiffs' logical observation that the defendants never truly treated the plaintiffs as if they were "new applicants" to a new program. Memorandum Opinion at pages 33-36. The actual treatment of the plaintiffs is sufficient government action to trigger their reasonable expectation of the continuation of benefits until the final resolution of any dispute over their eligibility.

On the subject of the so-called "new program," this Court has reviewed the GPA Policy Handbook. It is attached to the Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment. In describing the operation of the GPA program, this document illustrates that the term "reapplies" means nothing more than the affirmative step of seeking extension of benefits under 3 D.C. § 205.53(c). As the plaintiffs argue, this Handbook tends to debunk the notion that a genuinely "new" program was created by the 1991 statute.

It is also true that this record is devoid of any evidence that the District of Columbia Council actually intended to eliminate the so-called "old" benefits program — and such an intent is not cited in the statute in issue. The whole discussion of an "old" program and a "new" program seems to be borne of the litigation tactics of the defendants in shaping their arguments. It is easy to fall into the semantic trap of referring to "old program" and "new program" simply to track the arguments of the defendants. But there are not really two different programs—only an old and new set of medical criteria within the same, ongoing benefits program. In any

event, plaintiffs have a meritorious argument in their observation that they cannot be equated to persons who are applying for benefits under the revamped, 1991 statutory criteria as totally new welfare recipients.

Adequacy of the Notices as a Due Process Violation. Termination of welfare benefits constitutionally requires the provision of adequate prior notice, as well as a pretermination hearing. This is elementary. It is a critical feature of due process "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269. The question before this Court is whether the particular notice utilized here was "adequate" in the context of this particular class action.

In the present discussion, wherever this Court refers to the notices sent to the class members (hereinafter "the notice"), this Court is specifically referring to the notices sent **on or after November 14, 1991**—often described by defendants as the "corrected" notices. A sample copy of the notices was attached to the Memorandum Opinion. There are myriad constitutional deficiencies in the original set of notices, as described by plaintiffs. Left uncorrected, they are clearly not adequate. However, this Court will focus upon the notices that purported to solve those problems.

Although this Court has already noted the constitutional deficiencies in the notice, the Court remains convinced that they are not adequate in the full context of the termination scheme that is in issue. The plaintiffs have thoroughly described the problems with the notices, in all of their pleadings and particularly in section IV(B) of their Motion for Partial Summary Judgment. Their arguments are persuasive and the Court will not pause to repeat them in full detail. Nonetheless, the Court gives special weight to two of the most egregious problems

that render the notices inadequate for due process purposes.

First, as this Court has found previously and explained further herein, *infra*, the notices were devoid of any simple and practical information about the basis for the individual terminations. This Court finds that due process requires inclusion of a direct, fact-specific reason for the individual's termination. In this particular case, one of the many factors that compel the requirement of individually tailored explanations is the fact that the 1991 legislation engrafted into the GPA benefits program the standards employed by the federal SSI benefits program. Analogizing to the SSI model, the termination of a recipient under the new criteria can easily be grounded upon a reason that is not strictly a medical diagnosis. The SSI methodology embraces many nonmedical factors that could be pivotal to the ultimate denial of eligibility.

Second, the Court is impressed with the severe problem of a notice that is grossly misleading on a most important aspect of the notice, *i.e.* information concerning the right to appeal. In several respects, the notice not only provides two different statements as to the extent of this right, the notice is printed in such a way as to emphasize the plainly inaccurate version.

A close inspection of the same notice shows the following irregularities, as far as appeal rights are concerned. In block letters, the notice states:

> If you are not satisfied with this action, you may within 15 days from the date of this notice request a hearing. Your benefits will not be continued beyond the effective date of termination if the sole basis for the appeal is your failure to meet disability standards.

Directly below this admonition is an instruction that is set apart by double spacing between its block letters and asterisks that underscore each word. Highlighted in this

manner are the words, "VERY IMPORTANT READ THE MESSAGE BELOW CAREFULLY."

Indeed, below this instruction is a tiny, fine-print series of paragraphs entitled, "Your Right to A Hearing."

Within these paragraphs is a totally incorrect statement under the 1991 law: "If you make a timely request for a hearing your benefits will continue until a hearing decision is rendered." Obviously, the continuation of benefits during the appeal process was neither intended nor permitted by the 1991 statute. It is not surprising, then, that many persons who were terminated took differing approaches as to how they would proceed. Some appealed, some did not.

No problem can be as "misleading" as the publication of two diametrically opposed instructions about appeal rights—especially where the one that is highlighted is plainly incorrect. Moreover, the due process violation is especially grave where the statute involved prevents the government from voluntarily continuing the payments—to give the recipient the benefit of the printing gaff that seemed to promise the continuation of benefits.

The problems of lack of individual termination reasons and the internally misleading language are two unrelated deficiencies. Given the type of population involved in the plaintiff class (with the broad range of educational levels, disabilities, etc.), either of these deficiencies standing alone is sufficient to render the notices unconstitutional. Redrafting the language of the notice as to appeal rights, for example, does not compensate for the dearth of information about the cause of the termination, and vice versa.

The defendants have argued that the issuance of these notices was not a malicious attempt to deceive the members of the plaintiff class. Lack of actual malice, however, does not mean that the effect was not to prevent or dissuade recipients from seeking appeals or

otherwise taking steps to avenge their interests. In this regard, it was not inappropriate for the plaintiffs to cite the caselaw speaking to the effective meaning of unconstitutional notices, *i.e.* that the real effect of a misleading notice is not necessarily different from the practical effect of a notice that was issued for the specific purpose of deception. The case law only makes the point that the focus should be the result, not the motive.

Plaintiffs' most recent pleadings are replete with references to sworn accounts of what happened to certain plaintiffs as a result of misleading information from the notices, as well as discouraging and potentially misleading advice and comment from caseworkers. Without repeating all of that detail, it suffices to say that the Court accepts these unrebutted statements. They are credible and illustrative of the problems that can snowball from a constitutional violation. The Court in part has considered them in determining the scope of the injunction, as it may bring relief to the entire plaintiff class.

Applicability to the Instant Case of Quattlebaum v. District of Columbia. The defendants herein seek refuge in a recent opinion by another judge of the Superior Court in Carrie Quattlebaum, et al. v. Sharon Pratt Dixon [sic], et al., Civil Action No. 8207-91. This opinion was signed by the Hon. Ronald P. Wertheim on April 13, 1992. This was also a welfare rights class action in which the plaintiffs raised issues about the circumstances under which the District reduced their AFDC benefits. A careful look at this opinion reveals that it is not dispositive of the instant case and that the legal and factual underpinnings of Judge Wertheim's decision are distinguishable from the problems in the present litigation.

In essence, the defendants herein argue that in *Quattlebaum*,

> the Court also had to address the implementation of certain aspects of D.C. Law 9-27, . . . although admittedly a different section than this Court must review in this case. However, the *Quattlebaum* decision is still instructive. In *Quattlebaum* the Court had to determine the applicability of *Atkins* v. *Parker*, 472 U.S. 115 (1985), to the District's alteration of the formula assessing the minimum needs of AFDC recipients. This change had the effect of reducing benefits to most qualifying families. Even though this reduction was instituted across the board, Judge Wertheim found that the change nonetheless required somewhat of an individualized determination for each recipient family (See *Quattlebaum* at 16, n. 12).

Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment, at pages 5-6.

Defendants further quote Judge Wertheim's statement, "As the *Atkins* decision demonstrates, absent a law requiring personalized computations, no such requirement need be implied." *Quattlebaum* at 21. Ultimately, Judge Wertheim rejected the plaintiffs' contention that the District was required to provide each AFDC recipient with a precise dollar amount calculation of the proposed reduction in benefits. *Quattlebaum* at 21.

In the present case, the defendants argue that Judge Wertheim reached this decision in part because,

> [u]nder applicable Social Security regulations, the phrase "mass change" refers to changes in entitlements affecting large numbers of public assistance caseloads, is distinguished from an "adverse action," which refers to a decision by a State or federal agency to decrease a particular individual's entitlements."

Quattlebaum at 20. n.16, cited by defendants in their opposition at page 6.

Somehow, defendants rely upon the decision in *Quattlebaum* as holding that, even where some type of individual computation is necessary to calculate the individual reduction of benefits, no calculation need be included in a reduction notice. Defendants argue that the terminations in the instant case are not to be regarded as adverse actions. They contend that the implementation of D.C. Law 9-27

> never entailed a decision to decrease a "particular" recipient['s] benefits. Instead, the law eliminated the whole category of benefits for people who were only "incapacitated." D.C. Law 9-27 § (h)(2)(A).

Opposition at page 7.

This view is too simplistic and the defendants are wrong for several reasons. The *Quattlebaum* decision is not dispositive of the instant case.

First, it is not correct that the terminations in the instant case were not tantamount to decisions to decrease a "particular" recipient's benefits. These terminations (or 100% decreases) were the result of alleged individual reviews of the medical circumstances of particular persons. There was no simple, quantitative formula that was applied in robotic fashion to a whole class of persons.

Whatever the District did was an inherently subjective review that could not have been done by a computer or calculator. A medical review is *per se* an individualized analysis because each human being is different, as is his or her work history, training level, length or extent of disabling condition, etc.

By contrast, the decreases that were the subject of the *Quattlebaum* litigation were manifestly limited to adjustments based upon financial calculations. The formula was imposed in uniform fashion with no room for idiosyncratic departures, based upon personal characteristics of any recipient. As a fact of life, a financial

calculation and a medical review are not the same. They are not equally simple inquiries or functions.

Second, recalling this Court's prior discussion of the holding in *Atkins*, the formula change in *Quattlebaum* was nothing more than an example of the type of "across the board" change that need not include a finite dollar calculation in the notice of decrease or termination. In other words, *Quattlebaum* is simply the latest example of what *Atkins* permits. The decision in *Quattlebaum* only highlights why the instant case is not controlled by *Atkins*.

It is useful to note that in *Quattlebaum*, the crux of the litigation was an attack upon the local legislature's substantive decision to reduce AFDC benefits. Judge Wertheim found, as this Court has also recognized, that such a decision is well within the discretion of the Council of the District of Columbia. This Court has no quarrel with Judge Wertheim's analysis and does not find that any part of it compels a shift in this Court's disposition of this case.

It is also worthwhile for this Court to note that the principal reason for not requiring the issuance of individualized financial calculations, within the actual decrease or termination notice itself, is a problem that should not even exist in the instant case. Judge Wertheim noted that "**considerations of cost and the requirement of timeliness** may prohibit a state from generating thousands of personalized notices." *Quattlebaum* at 19 [emphasis supplied]. But the factual quagmire of applying new criteria to individual persons had already been done when the termination notices were sent out to the class members in the instant case. In fact, this task **by definition** had to be completed in order to arrive at the termination decision itself.

Whereas financial computations can be finalized at a time subsequent to the issuance of notice to the recipient, the actual analysis of each recipient's disability case had

already been accomplished prior to the issuance of the termination notices to the class members herein. In asserting that the termination notices were sent **because of an application of the new disability criteria**, they are essentially claiming that the Medical Review Teams (MRTs) had made individual assessments prior to the issuance of the termination notices. If that is true, the expense of doing so had already been incurred and there was no longer any excuse for not being able to cite the individual reason for the termination.

Such explanations in the notices could have been something as simple as noting, for example, that a person who could not work because of a leg amputation was being terminated from benefits because he now has acquired a prosthesis and has recovered from his surgery.

In other words, the real reason for the termination should have been reducible to a simple statement and each recipient's file should have contained it. If as to any individual class member the MRT actually went to the trouble of conducting that person's review, a recitation of the MRT's particular finding would not have been a burdensome addition to the notice, compared to the actual task of reviewing the case itself.

Reinstatement as a Remedy and New Notices as a Mootness Tactic By Defendants. In their Motion for Partial Summary Judgment, plaintiffs urge this Court to order that all members of the plaintiff class be reinstated to their GPA benefits, pending a constitutionally valid pretermination hearing. Plaintiffs contend that reinstatement is a proper and necessary remedy for the present constitutional violation.

Plaintiffs argue that reinstatement is compelled, largely for the following reasons. The denial of pretermination hearings was mandated specifically by the 1991 statute. The executive branch does not have the discretion to grant such hearings, voluntarily, in such a way as to

guarantee permanently that the unconstitutional part of the statute will not cause problems for present or future recipients. The executive branch, in other words, does not have the power simply to ignore a commandatory statute simply because it views the law as unworkable, unfair, nettlesome, or difficult to justify.

The District of Columbia Court of Appeals, in another welfare rights case, has observed as to DHS that

> an administrative agency has no authority to declare invalid legislation enacted by the parent legislature. It is the duty of the agency to administer the legislation and to apply its provisions according to its best lights.

Archer v. *District of Columbia Department of Human Services*, 375 A.2d 523, 526 (D.C. 1977). Similarly, the federal courts have emphasized the same fundamental principle of separation of powers and respect for the power of legislature. *See, e.g., Campbell* v. *U.S. Department of Agriculture*, 515 F. Supp. 1239 (D.D.C. 1981). An agency cannot substitute its judgment for that of Congress and choose not to implement the statutory mandate on the ground that it is administratively inefficient or unfeasible. *Id.* at 1249. This is equally true where an administrative agency might conclude that a statute simply is not fair or not popular.

It is clear that an order of reinstatement must be issued. A declaratory judgment of unconstitutionality, standing alone, will not assure due process to the plaintiffs.

Equally so, a voluntary effort by the defendants to issue so-called "new" notices of termination will not cure the constitutional violation in the statute. It will not be a substitute for a pretermination hearing, and it will not guarantee that some future administration will provide due process.

On this point, the defendants have suggested in their opposition to Plaintiffs' Motion for Partial Summary

Judgment that somehow this entire case can be mooted as to constitutional problems if the defendants simply issue another round of notices to the plaintiffs. Defendants opaquely state,

> [I]t is obvious that the District has many different avenues available to implement D.C. Law 9-27. Plaintiffs' [*sic*] do not have an unconditional right to the continued receipt of benefits in perpetuity. There is nothing which prevents the District from deciding to execute D.C. Law 9-27 in a fashion other than by use of the now disputed notice. . ., the statute could be complied with outside of the notice provision utilized to date. The District hereby reserves the right to do so.

Opposition to Plaintiff's Motion for Partial Summary Judgment at page 24.

More specifically, this conundrum can be described and resolved as follows.

Evidently, the parties are referring to a certain passage in the Memorandum Opinion in which this Court stated,

> Had DHS notified each recipient of the change in the program and the effect on him or her, and had it required each recipient to come into the agency and fill out a new application, due process requirements would have been met. Rather, the agency did not require each applicant to come in because they blanketly decided that a large number of individuals "simply would not come in to reapply."

Memorandum Opinion at page 30, citing Affidavit of Kate Jesberg, page 4, p 7.

Something in the above language has been taken by the defendants to mean that they can moot this case merely by issuing a new set of notices to the plaintiffs. Plaintiffs' interpretation of this Court's March 9 Memorandum Opinion is correct, on the whole, in characteriz-

ing this passage of the Memorandum Opinion as a hypothetical or illustrative commentary.

It is useful to review precisely what preceded this portion of the Opinion. At the outset, it is obvious that this part of the Opinion has no relation to the problem of the denial of a pretermination hearing. Rather, it embraced the Court's comments upon the deficits in the notices that were sent to the plaintiffs and other aspects of the litigation. For example, the Court recounted how the notices failed to specify precisely why each plaintiff was found to be "not disabled," particularly in light of the many categories that are basic elements of the Social Security "grid" analysis that is now mandated by D.C. Law 9-27. So, when this Court referred to the obligation of notifying "each recipient of the change in the program and the effect on him or her," this Court was speaking to the necessity of a written termination notice that would tailor the non-eligibility finding to the personal medical diagnosis, prognosis, and other non-medical Social Security "grid" factors and which would specify exactly which problems are the source of the recipient's non-eligibility.

Furthermore, when this Court noted that the agency had failed to require each GPA recipient to "come into the agency and fill out a new application," this Court was merely highlighting one of the reasons why there was no real "mass change" in the GPA program, *i.e.* that all program participants were not treated alike, that the so-called "old program" was not terminated, and that the District had consciously decided to forego or not utilize across the board, face to face explanations of why each terminated recipient was being cut off from benefits. The Court was implying that if all recipients had been required to come in to personally "apply" to a "new" program, this would have been at least one circumstantial indicator that there really was a "new program" that affected all recipients uniformly.

All parties should be aware that even the act of inviting or requiring all recipients to come in to "reapply" to an allegedly new program is not sufficient as a substitute for an adequately detailed, written notice of the precise, personally-tailored reasons for elimination from GPA benefits. Moreover, even the inclusion of such personally-tailored details is not the sum total of a constitutionally adequate notice of termination. As the Court has already described herein, *supra*, there are numerous elements of constitutional sufficiency of a termination notice. The individualized explanation as to the basis of non-eligibility is merely the beginning.

Despite the rhetoric in its pleadings about what the District might eventually do to implement the statute in some other fashion, the District has failed to make amends to the plaintiffs or to announce any other method of "implementing" D.C. Law 9-27 more fairly. Although the District has apparently "reserved the right" to issue some improved set of notices, it has not elected to do so.

The one point that the defendants continually fail to recognize is that even a constitutionally perfect notice will not save the defendants from the fatal legal problem of the denial of a pretermination hearing. To the extent that plaintiffs are denied a pretermination hearing by the statute, the cessation of welfare benefits is unconstitutional and legally invalid **for that reason alone**, even if there had never been any dispute about the content, typeface, or internal details of the termination notice itself.

Prior to a final ruling in the instant litigation, the only way to "moot" the problem of the denial of pretermination hearings was for the Council of the District of Columbia to repeal that portion of Law 9-27 published at 3 D.C. § 205.53(c)—and for the defendants to insure the right to pretermination hearings through executive branch action in the absence of the statutory mandate to deny them.

No repeal has taken place. Whether or not the Council ever takes this step is not the business of the Court. As long as the law remains in effect, the Court has no choice but to issue a ruling as to the constitutional validity of the statute.

Coverage of Post-March 9, 1992 Terminated Recipients and Plaintiffs Who Did Not Appeal Their Terminations. The present pleadings yield two issues about the definition of the universe of persons who should be afforded relief under any permanent injunction.

The first issue involves the question of whether this Court ever intended that the preliminary injunction cover those persons who received termination notices subsequent to the March 9, 1992 date of the preliminary injunction. In retrospect, the Court did intend that such persons be afforded the identical relief and protections under the preliminary injunctions. This is so for two reasons.

On one hand, the Court did not specifically articulate that the preliminary injunction should apply to post-March 9, 1992 terminations because the description of the termination process was interpreted by the Court to mean **that all termination notices had already been issued and that there were no more to come.** Stated differently, the Court had the impression that the class had closed.

The Court assumed this to be true for the following reason. Defendants described the termination process as involving the issuance of a termination notice to all GPA recipients who, at the end of their current six-month certification period, were found to be ineligible under the new medical criteria. Theoretically, since all recipients are subject to recertification every six months, anyone who was to be terminated would not have been kept on the active "client" roles for longer than six months thereafter. Thus, the Court calculated that all persons who were potential targets for termination

would have been reached by the time that the Court issued the preliminary injunction. In addition, this Court by inadvertence, failed to take into account the subgroup of the plaintiff class consisting of "GS" recipients whose certification is reviewed at twelve month intervals because they were previously found to be "disabled" rather than "incapacitated."

The Court had no reason to believe that persons who were to be terminated would have been allowed to remain as benefits recipients for longer than six months past September, 1991. The Court's Memorandum Opinion was issued more than six months after that date—and this was the approximate date when the terminations commenced under the 1991 legislative mandate.

This Court now realizes that there are members of the plaintiff class who are still potential targets of termination and that they have not been reached by administrative review.

The second reason why the post-March 9 terminations should have been subject to compliance with the injunction is that it is plainly illogical for the Court to have granted such relief to the plaintiff class and to have knowingly excluded these particular class members from the benefits of the injunction. This would have been totally inconsistent and unjustifiable. Thus, to the extent that the defendants have not reinstated benefits those persons who were terminated without a hearing after March 9, 1992, the spirit of the preliminary injunction has not been served. The Court, however, does not accuse defendants of violating the injunction willfully, in this regard. In any event, these persons shall be covered by a supplementation of the preliminary injunction and language in the permanent injunction.

The second issue raised about the persons who can benefit from the permanent injunction is the question of whether any permanent injunction should extend to

plaintiffs who did not appeal their termination, but who instead "reapplied" for benefits under the new statute. This Court has concluded that it would be entirely unfair not to include these plaintiffs as beneficiaries of the permanent injunction. They must be included for all of the reasons cited in plaintiff's Motion for Supplemental Preliminary Injunction and the Court agrees with all of the plaintiff's arguments on this point.

In issuing a preliminary injunction, this Court defined the group of beneficiaries by a conservative approach, as far as the scope of the injunction was concerned. This was appropriate because, after all, a preliminary injunction is purely for temporary relief. The Court was indeed concerned about acting too hastily when the actions of some class members were not clear at that point in the litigation.

Plaintiffs observe in their Motion for Supplemental Preliminary Injunction,

> Though not specified in the Court's order, plaintiffs assume the ambiguity perceived by the Court related to those individuals who actually may have had no dispute with the Medical Review Team's ("MRT") nondisability finding. However, there is no such ambiguity when addressing those individuals who, because of confusion regarding their rights, reapplied for the GPA program instead of filing an appeal.

Motion for Supplemental Preliminary Injunction at page 3. The Court fully agrees with this comment by the plaintiffs, especially in light of the Court's conclusions regarding the confusing nature of the termination notices. Thus, the Court will certainly include in its permanent grant of relief all class members who "reapplied" for benefits under the new statutory criteria and who did not "appeal" their terminations.

It is significant to remember that the Court has found to be unconstitutional a certain section of the 1991 GPA statute. Insofar as a statutory constitutional violation has

been visited upon the entire class, it is not intellectually honest for the Court to deny relief to those persons who opted between two different, legitimate approaches to maintaining their benefits and who chose simply to reapply. The decision as to whether to take an appeal or whether to "reapply" under the new disability criteria was a choice made under desperate circumstances by the most vulnerable persons in our community. There is hardly any statute that offends the United States Constitution that does not also offend the concept of basic fair play. It does not serve the interests of justice to deny reinstatement of benefits to persons who simply did what seemed to be the most expedient thing to preserve their funds for basic food and shelter.

The persons terminated in the post-March 9 era who either appealed or reapplied are victims of the same basic intrusion upon their property interest in maintaining welfare benefits. That property interest has no qualitative difference among those who appealed and those who "reapplied."

A knotty problem remains as to those class members who simply did not take either step: those who neither appealed nor reapplied.

Counsel for plaintiffs urge this Court to include those persons also in any injunction or order that would require defendants to reinstate GPA benefits. The Court has given thorough consideration to the situation of these class members and the Court concludes that under the totality of circumstances it would not be equitable to force the defendants to reinstate benefits to this discrete, third sub-set of the plaintiff class in a wholesale fashion and outside of a strict deadline by which these plaintiffs must identify themselves and preserve their rights.

It is basic that a claimant must step forward and make a claim, protest, or demand of some kind. These individuals have never done so and the litigation has simply moved on. The Court must draw some practical lines to

bring closure to the dispute and to avoid, in its equitable rulings, the imposition of an inappropriate burden upon the District.

To this end, the permanent injunction to be issued today will encompass a deadline by which these class members must affirmatively demand reinstatement. The injunction will include an obligation of the defendants at least to notify these former recipients for the last time that reinstatement, and appeal, is still possible because their initial terminations were unconstitutional. This will be a final opportunity for these particular class members to be restored to the status that they occupied prior to the issuance of the improper notices and the denial of pretermination hearings. The keystone of equitable relief is restoration of the victim to his original status.

The Court intends to limit the burden upon the District in the manner explained more fully in the permanent injunction. Suffice it to say that once the District has complied with the requirements of the permanent injunction, the District will not be forced to make any further search for these individuals.

Retroactive Payments for Reinstated Plaintiffs. For purposes of fashioning a remedy within a permanent injunction, this Court has carefully considered the matter of whether it should order the payment of benefits retroactive to the effective dates of the terminations. The Court finds that retroactive payments are not unreasonable and, indeed, that they are vital for several reasons.

First, the Court accords great weight to the simple fact that the persons who were terminated from their benefits were a part of this entitlement program because of their precarious living conditions. Compared to our population as a whole in the District of Columbia, they are our neediest citizens because they depended upon the benefits for the most basic elements of survival: food, shelter, clothing and special personal needs such as

transportation to medical care. Because the benefits were designed to support the fundamentals of daily life (rather than elective expenses) it is only reasonable to presume that these needs were not fully met in the period between the terminations and the issuance of the preliminary injunction. This was not a marginally short period of time. The needs presumably have not abated.

Second, the instant class action is certainly not the kind of case in which there is doubt that "a substantial percentage of these recipients had their benefits improperly reduced or terminated." *Foggs* v. *Block*, 722 F.2d 933, 941 (1st Cir. 1983), *rev'd sub nom. Atkins* v. *Parker*, *supra*. All of the class members were denied a pretermination hearing, without any exception or qualification. This constitutional violation was uniform to all class members. Furthermore, they all received the same boilerplate notices that were misleading also in uniform fashion. If there were "improperly reduced or terminated" benefits as to one class member, the problem exists as to all class members. There is no room to distinguish between some class members who deserve retroactive payments and others who do not.

Third, the daily needs of the class members did not disappear or abate, simply because the money was not being disbursed. As a practical matter, the requirement of retroactive benefits can still make a difference in the health, safety, and stability of all class members. As the plaintiffs explain, "To the extent that recipients have had to put off finding housing outside of shelters because they did not have the money, retroactive benefits will provide security deposits and first month's rent while providing a cushion for future months." Motion for Partial Summary Judgment at page 35 [footnotes omitted].

Fourth, the benefits that are involved here are disbursed for basic subsistence. The money is not paid out for elective expenses. In the District of Columbia, our laws and jurisprudence do not permit the avoidance of

arrearages in child support and alimony—payments that are also forms of fundamental maintenance. Thus, the same principle should apply to the members of this class. The class members' "subsistence" needs are even narrower than the court-ordered financial support of children, insofar as it has no connection to school tuition and other more elaborate, long-term costs of living. The case for retroactive payments to the plaintiff class is more clearly supportable as the insurance of retroactive payments owed to children and dependent former spouses.

A fifth, unrelated reason is the matter of consistency in the Court's legal analysis. Stated simply, if the Court finds that there have been unconstitutional violations that directly caused the cessation of benefits, there is no intellectually consistent reason to sanction the nonpayment by not requiring the disbursal of the money that should have been paid out. If the termination of payments was unconstitutional, such illegal government action cannot be rewarded (or the harm cheapened) by the refusal to impose monetary reparations.

Finally, the refusal or declination to order retroactive payments would be an unjustified method through which the defendants could accomplish indirectly what the United States Constitution prevents them from doing any further—and which they should not have been able to do in the first place. What they would accomplish, then, is the saving of money through improper and unfair procedures.

Necessity for a Detailed Permanent Injunction and Order of Corrective Measure. Although the Court has no desire to micromanage the District's implementation of its new eligibility criteria, it is necessary still to provide a reasonable amount of detail in the injunction so that the defendants know what to do to comply with the Court's judgment.

In addition, for the immediate future it is in the interests of all parties to order that there be compliance reports, to avoid any slippage of adherence to the judgment and to insure that the Court can address any initial disputes or need for further explanatory detail. The filing of the Motion for Supplemental Preliminary Injunction illustrates the potential for additional refinements to the Court's rulings.

A permanent injunction must issue. The plaintiffs have satisfied all of the four basic factors that must be considered in the granting of such relief. On the merits, plaintiffs have demonstrated that the law precluding pretermination hearings is unconstitutional and that the notices utilized in the terminations were not constitutionally adequate. The public interest continues to lie in maintaining, fairly, the flow of welfare benefits to persons who meet the published standards or who have not yet been proven to be ineligible for their continuance. The equities of the entire set of circumstances clearly favor the plaintiff class. There will be continuing irreparable injury in the absence of a permanent injunction. This is true for the reasons already set forth in the Memorandum Opinion and because the range and severity of problems flowing from the terminations will only be exacerbated over time.

The Court also notes, as to irreparable injury, that for those class members who appealed their terminations the withholding of benefits pending appeal is especially injurious because the appeals are not in fact being reviewed in substance. This is indicated in the deposition of Mr. Holloway Wooten, Chief of the Office of Fair Hearings for DHS, attached to Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment.

The specific relief to be ordered, consistent with the instant Opinion and Order shall be set forth in more detail in the Permanent Injunction filed of even date

herewith. Other rulings are summarized as follows. It is by the Court this 8th day of September, 1992

ORDERED that the plaintiff's Motion for supplemental Preliminary Injunction is granted; and it is

FURTHER ORDERED that the preliminary injunction is hereby supplemented and amended to include in the persons entitled to relief therein the following: all members of the plaintiff class who, subsequent to March 9, 1992, were terminated from their GPA benefits without a hearing; and it is

FURTHER ORDERED that defendant's Motion to Dismiss is denied; and it is

FURTHER ORDERED that plaintiff's Motion for Partial Summary Judgment is granted as to Counts I, II, III, and IV of the complaint; and it is

FURTHER ORDERED that counsel shall appear before this Court for a status hearing, regarding compliance with the permanent injunction, on December 2, 1992 at 2:30 p.m. in Courtroom 53 at 451 Indiana Avenue, N.W. (Building D of Superior Court); and it is

FURTHER ORDERED that a permanent injunction and partial judgment shall issue of even date herewith and that the instant Opinion and Order is incorporated by reference in the permanent injunction; and it is

FURTHER ORDERED that the remaining count in the complaint shall be scheduled for trial after the completion of discovery.

/s/ Cheryl M. Long
CHERYL M. LONG
Associate Judge

APPENDIX E

D.C. Code § 3-205.42. Definitions relating to incapacity and disability.

For the purpose of determining coverage and conditions of eligibility of applicants and recipients in financial and medical assistance programs of the District, the Mayor shall apply the following definitions relating to incapacity and disability with respect to parents and other adults who are otherwise eligible for assistance under such programs:

(1) *Physical or mental incapacity.*—(A) For the AFDC program, physical or mental incapacity shall be deemed to exist when 1 parent has a physical or mental defect, illness, or impairment. The incapacity shall be supported by competent medical testimony and must be of such a debilitating nature as to reduce substantially or eliminate the parent's ability to support or care for an otherwise eligible child and be expected to last for a period of at least 30 days.

(B) Repealed.

(C) In making the determination of ability to support, the Mayor shall take into account the limited employment opportunities of handicapped individuals.

(D) A finding of eligibility for OASDI or SSI benefits, based on disability or blindness, shall be deemed acceptable proof of incapacity for purposes of the AFDC program.

(2) *Disability.*—An individual shall be deemed to be disabled if the individual is determined by the Mayor to be disabled based upon the criteria for the supplemental security income program established pursuant to the Social Security Amendments Act of 1972 (42 U.S.C. § 1381 et seq.), for the purposes of establishing eligibility for the GPA program.

* * * *

D.C. Code § 3-205.42a. Eligibility for General Public Assistance.

(a) Except as provided in subsection (b) of this section, beginning July 1, 1991, an individual shall be eligible for GPA benefits only if the individual has a disability as defined in § 3-205.42(2).

(b) An individual who is receiving GPA benefits on June 30, 1991, may continue to receive GPA benefits until the expiration of the individual's certification period. Benefits beyond the expiration of the certification period shall not be paid to an individual unless the GPA recipient reapplies for benefits and is determined to have a disability as defined in § 3-205.42(2).

* * * *

D.C. Code § 3-205.53. Reconsideration of grants; modification of amount; duty of recipient to notify Mayor of change of circumstances; grants under General Public Assistance Program for Unemployables.

(a) All public assistance grants made under this chapter shall be reconsidered by the Mayor as frequently as he or she may deem necessary, but in every case the Mayor shall make such reconsiderations at least once in each year. After such further investigation as the Mayor may deem necessary, the amount of public assistance may be changed, or may be entirely withdrawn, if the Mayor finds that any such grant has been made erroneously, or if he or she finds that the recipient's circumstances have altered sufficiently to warrant such action. If at any time during the continuance of public assistance the recipient thereof becomes possessed of income or resources in excess of the amount previously reported by him or her, or if other changes should occur in the circumstances previously reported by him or her which would alter either his or her need or his or her eligibility, it shall be his or her duty to notify the Mayor of such fact immedi-

ately on the receipt or possession of such additional income or resources, or on the change of circumstances.

(b) The period of payment of public assistance grants under the General Public Assistance Program shall be limited to such period as may be determined by the Mayor. No payment shall be made to any applicant or recipient of GPA for a period in excess of 12 months for the same disability unless the grant is reviewed as the result of a reapplication by the applicant or recipient, as provided in subsection (c) of this section.

(c) Any person whose public assistance payment had been terminated because of the provision of subsection (b) of this section and now, because of a continuing inability to work due to a physical or mental disability, continues to require such assistance may reapply for an extension of the period of the payment of such GPA. Sixty days prior to termination of the period of eligibility the Mayor shall notify the client in writing advising him or her to submit a new medical report and to request continuation of assistance within 30 days of the date that the notice is mailed (postmarked), if he believes he is still eligible for assistance. No client who submits to the Mayor the request for continuation of assistance and submits a new medical report within the 30 days of the date his or her notice is mailed (postmarked) shall have his or her assistance terminated unless his or her case has been reviewed by the Mayor and he or she has been found ineligible. Benefits shall not be continued beyond the effective date of termination if the sole basis for the individual's appeal of the termination is the failure to meet the disability standard defined in § 3-205.42.

(d) For the purposes of this section, GPA covers adult individuals and adult couples without children who:

(1) Are between the age of 18 to 64 years;

(2) Are not eligible for AFDC;

(3) Have been determined to be disabled by the Mayor; and

(4) Have applied for Supplemental Security Income ("SSI") benefits at the time an application for GPA benefits is filed.

(2)

No. 96-504

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,
Petitioners,

v.

MARION S. BARRY, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case involves the District of Columbia General Public Assistance ("GPA") program, an entirely locally-funded program of monthly cash assistance for certain adults who cannot work due to disability or incapacity as defined by local statute. In early 1991, due to severe budgetary constraints facing the District of Columbia, the D.C. Council adopted a number of cost-reduction measures, including the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991, D.C. Law 9-27 (the "Act"). This legislation, among other things, eliminated the GPA program for "incapacitated"

persons, and adopted a new eligibility standard for GPA benefits. In addition, the legislation placed a durational limit on entitlement to benefits by providing that persons entitled to GPA benefits under the new statutory standard would receive benefits for a certification period of not more than twelve months and would not be entitled to continuation of benefits once this period ended, unless they reapplied for benefits and were determined to be eligible for them.

The petitioners challenge these substantive amendments to the GPA program alleging that they are unconstitutional on their face as violative of the procedural component of the Due Process Clause of the Fifth Amendment. The District of Columbia Court of Appeals rejected the challenge and reversed the trial court's ruling of unconstitutionality.

1. GPA Prior to July 1991.

Prior to July 1, 1991, the GPA program provided assistance to three categories of adults who do not have minor children in their care.[1] They were: (1) adults who were incapacitated and unable to work for at least thirty days (designated "GU"); and (2) adults who were disabled and unable to work for at least twelve months (designated "GS"). D.C. Code § 3-205.42 (1988 ed.).

In order to qualify under the GU program, an individual had to be over 18 years old, be financially needy, and meet the definition of "incapacity" contained in the statute. D.C. Code §§ 3-201.1, 3-205.1, 3-205.42 (1988 ed.). "Incapacity" was defined as "a physical or mental incapacity" that is "supported by competent medical testimony and . . . of such a

---

[1] Adults with minor children qualify for Aid to Families with Dependent Children (AFDC).

debilitating nature as to reduce substantially or eliminate the ability of the applicant or recipient to care or support himself or herself and be expected to last a period of at least 30 days." D.C. Code § 3-205.42(1)(B) (1988 ed.). This incapacity test is substantially lower than the one for the federal Supplemental Security Income (SSI) program, and individuals eligible under it generally did not qualify for SSI or any federally established welfare program.

Payments under the GU program were limited by statute to a time-specific period of not more than six months (the "certification period"). D.C. Code § 3-205.53(b)(1988 ed.). Benefits could not be continued beyond the certification period for the same incapacity unless the recipient reapplied for benefits. *Id.* Sixty days before the end of the certification period, the District was required to provide recipients with notice that informed them that if they believed they remained entitled to public assistance, they should submit, within thirty days, a medical report, a social history and a request for continuation of benefits. D.C. Code § 3-205.53(c) (1988 ed.). If a request for continuation of benefits was submitted, benefits could not be terminated until a determination was made that the recipient was ineligible. *Id.* In addition, recipients were entitled to continue to receive benefits if the recipient requested a hearing to challenge the determination that he or she was ineligible for benefits. D.C. Code § 3-205.59 (1988 ed.).

The GS program covered persons who met the statutory definition of "disability" under D.C. Code § 3-205.42(2)(1988 ed.):

> [a]n individual shall be deemed to be disabled if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

> which can be expected to result in death and which has lasted or can be expected to last for a continuous period of not less than 12 months.

Id. A GS recipient was required to apply for benefits under the federal Supplemental Security Income benefits program ("SSI"). That is because this definition was similar to that in the SSI program and individuals who qualified under it were likely also to qualify for SSI.

Under the GS program, the Mayor was required to reconsider the public assistance grant at least once a year. D.C. Code § 3-205.52 (1988 ed.). If benefits were denied as a result of this reconsideration, and the recipient appealed this denial, he or she was entitled to a continuation of benefits pending a hearing. D.C. Code § 3-205.59 (1988 ed.). Under both programs, if a recipient's benefits were incorrectly terminated, the recipient could receive those benefits retroactively. D.C. Code § 3-208.1(a)(1988 ed.).

2. D.C. Law 9-27.

In the spring of 1991, the District of Columbia government faced severe financial and budgetary constraints as a result of the economic recession. Report of the Council Committee on Human Services on the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991 at 2 (Apr. 25, 1991)("Committee Report"). As a consequence, the budget proposal submitted by the Mayor and approved by the D.C. Council for fiscal years 1991 and 1992 contained a number of reductions in governmental spending. *Id.* at 2-3. As the Council explained, "funding simply does not exist to fund adequately each and every program which the District has provided funding for in the past," and thus, "agencies and programs must accept some funding reductions." *Id.* at 3.

The reductions in governmental spending resulted in the enactment of D.C. Law 9-27, which amended the Public Assistance Act of 1982, D.C. Code § 3-201 *et seq.*, in a number of ways, including the changes in the General Public Assistance program that are at issue in this action.[2] This legislation enacted three substantial changes in the GPA program.

First, D.C. Law 9-27 eliminated the GPA benefits for incapacitated persons, thereby terminating the GU program. The legislation provided that "beginning July 1, 1991, an individual shall be eligible for GPA benefits only if the individual" meets the disability standard established for the federal Supplemental Security Income (SSI) program. D.C. Code § 3-205.42a(a)(1994 ed.). The Committee Report accompanying the legislation explained that this step was necessary because the "stark reality of the situation is that the AFDC caseload is increasing and there is a dire need to maintain adequate funding for the growing AFDC caseload which is comprised of needy children." Committee Report at 5.

In order to soften the blow of the termination of the GU program, the new law permitted the payment of benefits to incapacitated persons under the GU program to continue until the expiration of the recipient's certification period. *See* D.C. Law 9-27, § 2(f), *codified at* D.C. Code § 3-205.42a(b)(1994 ed.). Once that certification period expired, however, the legislation provided that "[b]enefits . . . shall not be paid to an individual unless the GA recipient reapplies for benefits and is determined to have a disability" that meets the federal SSI standard. *Id.* Second, the legislation provided that "[n]o payments shall be made . . . for a period in excess of 12

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[2] D.C. Law 9-27 also reduced the level of public assistance benefits.

months . . . unless the grant is reviewed as a result of a reapplication by the applicant." D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53(b)(1994 ed.). The legislation retained the provision requiring the government to provide recipients with 60 days notice of the end of the certification period, and permitting recipients to continue to receive benefits past a certification period in the event that a determination had not been made on the reapplication for benefits. *Id.* However, the legislation made clear that recipients would not have a right to continued benefits past the certification period if the reapplication was rejected, stating:

> Benefits shall not be continued beyond the effective date of termination if the sole basis of the individual's appeal of the termination is the failure to meet the disability standard defined in D.C. Code § 3-205.42.

D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53 (1994 ed.).[3]

Third, the new legislation amended the statutory definition of "disabled" that the GPA program had previously used. Under D.C. law 9-27, an individual "shall be deemed to be disabled if the individual is determined . . . to be disabled based upon the criteria for the Supplemental Security Income program established pursuant to the Social Security Amendments Act of 1972." D.C. Law 9-27, § 2(e), *codified at* D.C. Code § 3-205.42 (1994 ed.).

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[3] The legislation did not amend that provision entitling a recipient to retroactive payments if the initial rejection of the reapplication was later determined to be erroneous. D.C. Code § 3-208.1 (1988 ed.).

As construed by the courts below, the principal function of the statute in establishing the new criteria under which welfare payments are made only to those who are unemployed due to medical disability is to provide assistance "while they are awaiting a decision from HHS as to their applications for federal disability benefits" under the SSI program. (A. 70a) "The local benefits serve as a stop-gap measure to assist such persons with survival funding while they seek more substantial financial help from the federal government." (*Id.*)

3. Implementation of the New Law.

The new law permitted public assistance recipients to continue to receive their grants under the old law until the expiration of their individual certification periods. As a result, the implementation of D.C. Law 9-27 was actually a phased-in process.

Beginning in the summer of 1991, GPA recipients' certification periods began to expire. At that time, the D.C. Department of Human Services (DHS) sent to the recipients notification that their certifications were coming to an end and informed them that they must complete the enclosed medical record and social history forms if they wished their benefits to continue. The completed medical record form and social history form were then submitted to the DHS medical review team for a determination as to whether they were eligible for benefits under D.C. Law 9-27. If the medical review team determined that the recipient was not disabled, the recipients' benefits were terminated at the end of their certification period.

Once the medical review team determined that a recipient was not disabled, DHS sent the recipient a notice stating that his or her benefits would be terminated "because based on the

medical information you provided you were not determined to be disabled." In addition, the notice informed the recipient, in capitalized letters, that "your benefits cannot be continued beyond the effective date of termination if the sole basis for the appeal is your failure to meet disability standards." However, the notice also contained, in small print, some form language, which stated in part: "If you make a timely request for a hearing your benefits will continue until a hearing decision was rendered."[4]

The Superior Court of the District of Columbia held that the new law was unconstitutional on its face, under the Due Process Clause of the Fifth Amendment, for failure to provide a hearing prior to termination of benefits, despite expiration of the recipients' certification periods.

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[4] In addition, in November 1991, a notice was sent to each public assistance recipient that stated:

> Dear Recipient,
>
> Recently enacted D.C. Law 9-27, at Section 542, eliminates incapacity as a basis for general public assistance (GPA) benefits. Only those persons who are medically determined by the Mayor to be disabled, based upon the criteria for the supplemental social security program established pursuant to the Social Security Amendments Act of 1972, will be eligible for benefits. Those of you who have received benefits based upon incapacity will continue to receive benefits until the expiration of your certification period. At that time, it will be necessary for you to submit a new medical evaluation which will be used to determine your eligibility for general public assistance benefits.

4. The Decision of the D.C. Court of Appeals.

The Court of Appeals held that GPA recipients have a property in the continued receipt of their welfare benefits only for the duration of their certification period. The Court stated that recipients "possessed no 'property interest' in the continued receipt of GPA benefits extending beyond the expiration of the current certification period following the enactment of D.C. Law 9-27." (A. 4a) When their certification periods expired, the Court stated, "these hold-over recipients had no 'right' to continued benefits and stood under the statute in virtually the same posture as first-time applicants." (A. 15a)

REASONS FOR DENYING THE WRIT

At the outset, it should be recognized that the formal statement of the question presented in the petition does not deal with the principal rationale of the Court of Appeals in upholding the constitutionality of the legislation involved in this case. In the view of the Court of Appeals, this case concerns the power of the D.C. Council to define the nature and duration of recipients' entitlement to welfare benefits. More specifically, to that Court, the case presents the question of whether the procedural component of the Due Process Clause of the Fifth Amendment places a substantive limitation on the authority of the D.C. Council to place a durational, one-year limit on welfare entitlement in the GPA program, where the durational limit is closely related to the purpose of the program. We question whether the Court may appropriately issue a writ of certiorari in this case, where the petitioning parties ignore the principal rationale of the Court of Appeals in stating their question presented.

Here, the purpose of the program is to provide transitional GPA benefits while recipients seek SSI benefits. Certainly, a

one-year period is a sufficient period for federal officials to process these applications. Decisions of this Court make it clear that legislatures have plenary authority to define entitlements to public benefits in this manner. This case does not present a significant question for the Court's consideration.

I. DECISIONS OF THIS COURT PERMIT THE D.C. COUNCIL TO PLACE SUBSTANTIVE, DURATIONAL LIMITS ON WELFARE ENTITLEMENTS.

The principal rationale of the Court of Appeals in holding that the petitioners were not entitled to a hearing prior to termination of their benefits was that petitioners had no entitlement or property interest in continued receipt of payments beyond the expiration of their current certification period. That is because the D.C. Law 9-27, § 2(h), *codified at* D.C. Code § 3-205.53(b)(1993 Supp.), placed a durational limit on welfare entitlement in the GPA program. (A. 4a, 15a) As a result of this section, neither those persons who established their eligibility for benefits under D.C. Law 9-27 nor those persons who had been receiving benefits under the pre-amendment incapacity standard were eligible for benefits past the expiration of their certification periods unless they reapplied for benefits and were determined to be eligible for them. The petitioners argue that the certification periods established by District law are procedural in nature and therefore cannot limit the rights of GPA recipients to continue to receive need-based benefits pending an evidentiary hearing under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

It is well-established, however, that the extent of any property interest in a state welfare program is defined by that state law. As the Court explained in the seminal case of *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (em-

phasis added),

> Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. . . .
>
> Just as the welfare recipients' "property" interests in welfare payments *was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment.*

See also, *Bishop v. Wood*, 426 U.S. 341, 344 (1976)("the sufficiency of the claim of entitlement must be decided in reference to state law").

The petitioners seek to distinguish *Roth* from the District's assistance program on the ground that the contract at issue in *Roth* contained no provisions for renewal. The petitioners argue that because GPA recipients may receive benefits for additional certification periods, the time limitation is a "procedural" mechanism in this case rather than a substantive limitation as the Supreme Court found in *Roth*. And because the time limit is "procedural," the petitioners contend that Section 2(h), which precludes GPA recipients from receiving benefits past the certification period even if they are appealing a denial of their reapplication, is unconstitutional under *Cleveland Bd.*

of Educ. v. Loudermill, 470 U.S. 532 (1985).

Loudermill does not so limit the power of the legislatures. In *Loudermill*, the Court held that the question of "what process is due" is answered by the federal Constitution, not by state law. 470 U.S. at 541. But, in so ruling, the Court did not diverge from the principle that the dimensions of any asserted property interest is determined by state law, not by the Constitution. The Court began its decision by recognizing the rule established in *Roth* that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" 470 U.S. at 538 (quoting *Roth*, 408 U.S. at 538). It was only after examining the state law and ascertaining that the law provided the claimant with a property interest that the Court turned to its rejection of the "bitter with the sweet" approach in answering the question of what process is due.

The petitioners' argument, if accepted, would leave legislatures in the position of choosing between the unlimited time-period needs program that was involved in *Goldberg* and a program that eliminates the ability of recipients, regardless of need, to receive benefits beyond a time-specific period. There is no justification for so limiting the power of the legislature. Although *Loudermill* rejected the "bitter with the sweet" approach to the question of what process was due, neither that decision nor any other one has restricted legislatures' power to define temporally the reach of a benefits program. Indeed, in a decision issued the same term as *Loudermill*, the Court explicitly recognized that the legislature retains the "plenary power to define the scope and duration of the entitlement." *Atkins v. Parker*, 472 U.S. 115, 129 (1985).

Thus, contrary to the petitioners' claim, states may constitutionally chose (as Congress has done with the federal food stamp program),[5] to establish a need-based assistance program that limits any property interest to discrete time periods, but permits recipients to obtain benefits on an uninterrupted basis if they requalify for those benefits for another time period.

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[5] The entitlement structure of the GPA program is not new. The GPA program, including the refusal to provide benefits beyond the certification period of eligibility for recipients who have reapplied for benefits and are challenging a denial of that reapplication, is the same in structure in essential respects as that established by Congress for the federal Food Stamp Program in 1977, nearly twenty years ago. *See Banks v. Block*, 700 F.2d 292, 294-95 (6th Cir. 1983)(describing the structure of the Food Stamp Act), *cert. denied*, 464 U.S. 934 (1983). Under the Food Stamp Program, recipients are given specific certification periods for eligibility to food stamp benefits; are required to reapply for benefits past the certification period; do not receive a hearing before an initial determination is made on the reapplication; and are precluded from receiving benefits past the expiration of the certification period even if the beneficiary is appealing a denial of the reapplication. *See Banks*, 700 F.2d at 294-95.

In judicial challenges to the congressional enactment, both the Fourth Circuit and the Sixth Circuit have concluded that termination of food stamp benefits without a hearing when a certification period ends does not violate the Due Process Clause, because there is no property interest in the continuing receipt of benefits beyond the certification period. *See Banks*, 700 F.2d at 298; *Jackson v. Jackson*, 857 F.2d 951 (4th Cir. 1987); *Holman v. Block*, 823 F.2d 56 (4th Cir. 1987).

II. PETITIONERS' CONCESSION BEFORE THE COURT OF APPEALS LIMITS THEIR ABILITY TO CHALLENGE THE PRINCIPAL RATIONALE OF THAT COURT IN RULING THAT PETITIONERS DO NOT HAVE A PROPERTY INTEREST THAT REQUIRES A PRIOR HEARING.

This case involves whether the Council of the District of Columbia may establish for the District a GPA program with distinct and separate entitlements or property interests, termed "certification periods," which limit a welfare recipient's participation in the program. As noted by the Court of Appeals, "[p]laintiffs' counsel, at oral argument, candidly acknowledged that the Council *could* have limited a recipient's entitlement to GPA benefits to a concrete, finite span of time, such as a year or a 'certification period.'" (A. 9a-10a, emphasis, the Court's) It seems to us that this concession limits the question of whether the Council did, in fact, create a durational limit on entitlement to one of statutory construction of local law.[6] The question of whether the Council did what the petitioners conceded it had the power to do turns on an interpretation of the statute and is not a question requiring this Court's further review.

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[6] The Court of Appeals found it "readily apparent" from the statute that the Council imposed "a substantive temporal limitation upon the GPA entitlement for those persons receiving benefits." (A. 11a)

III. THE LIMITATION ON GPA WELFARE ENTITLEMENT DOES NOT WARRANT REVIEW.

The petitioners argue that this case has special importance warranting review by this Court in light of the recent welfare reform legislation enacted by Congress, which will repeal the Aid to Families with Dependent Children (AFDC) program and replace it with a system of Block Grants to the States and the District of Columbia, to be used by them to finance assistance programs they choose to enact. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 103, 110 Stat. 2105 (1996) ("the Welfare Reform Act"). Petitioners suggest that a decision in this case will provide guidance to the States and federal officials in establishing the new state assistance programs contemplated by the Welfare Reform Act.

In the Welfare Reform Act, Congress reversed the more than fifty-year-old AFDC policy of providing a federal entitlement to welfare; the Welfare Reform Act does not provide recipients with any entitlement to payments. *Id.*, at § 103, amending § 401 of the Social Security Act, to be codified at 42 U.S.C. § 601(b) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."). The Reform Act also requires (with limited exceptions) the States and the District to impose a five-year, lifetime limit on the receipt of assistance payments to any recipient in programs funded by federal block grants. *Id.*, §103, amending § 408 of the Social Security Act, to be codified at 42 U.S.C. § 608(a)(7). As can be seen, the changes effected by the D.C. Council in the GPA program were rather modest, by comparison.

Petitioners, in effect, ask the Court to use this case as a vehicle to impose on federal welfare officials and the States additional constitutional limitations on their authority in implementing these reforms. (Pet. at 24-26) In our view, the new reform legislation counsels the opposite approach. The Court should await action by the States and federal government in implementing the new legislation before it considers additional constitutional limits.

IV. THERE IS NO DIRECT CONFLICT BETWEEN THE DECISION BELOW AND OTHER APPELLATE DECISIONS.

The petitioners allege the existence of a direct conflict between the decision of the Court of Appeals and many decisions of the United States Courts of Appeals and of the highest state courts. There is no such conflict.

The only decisions cited by petitioners involving statutory schemes with a similar entitlement structure are those that deal with the federal Food Stamp program. *See*, *Banks v. Block*, *supra; Jackson v. Jackson*, *supra;* and *Holman v. Block*, *supra.* The GPA program, including the refusal to provide benefits beyond the certification period of eligibility for recipients who have reapplied for benefits and are challenging a denial of that reapplication, is the same in structure in essential respects as that established by Congress for the federal Food Stamp Program in 1977; and upheld by the courts in those decisions.

Because the property interest in continued receipt of food stamps ended at the end of the certification period, the courts in *Banks* and *Holman* rejected the recipients' claim that *Goldberg v. Kelly*, 397 U.S. 254 (1970), required that they receive pretermination hearings. As the courts explained, the

ruling in *Goldberg v. Kelly* was based on the fact that "recipients were entitled to benefits, on a continuous basis, as long as they remained eligible." *Banks*, 700 F.2d at 297; *Holman*, 823 F.2d at 59. Thus, the courts concluded that *Goldberg v. Kelly* does not require that benefits be continued pending a hearing when the statutory entitlement to those benefits has ceased.

The Court of Appeals reached the same result here. Unlike the welfare statute at issue in *Goldberg v. Kelly*, D.C. Law 9-27 entitles recipients to benefits for a maximum of twelve months. After the certification period expires, the GPA recipient must reestablish his or her entitlement to benefits. Indeed, the GPA recipient stands under the statute in virtually the same posture as a first-time applicant. And applicants to a benefits program have no constitutional right to receive benefits while their claim is being processed. *See Lavine v. Milne*, 424 U.S. 577, 586 (1976)("nothing in the Constitution requires that [public assistance] benefits be initiated prior to the determination of an applicant's qualifications at an adjudicatory hearing."). In short, as the Court of Appeals held, GPA recipients have a property interest in the continued receipt of their benefits only for the duration of their certification period.

None of the allegedly conflicting decisions has an entitlement structure similar to that in the GPA or in the food stamp programs. For example, petitioners rely heavily on *Youakim v. McDonald*, 71 F.3d 1274 (7th Cir. 1995) and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), which are distinguishable from this case on the ground that the programs involved in those cases had open-ended entitlements, as opposed to programs where legislatures have placed durational limits on entitlements like those in the GPA or Food Stamp programs. Those cases deal with the issue of the procedures, if any,

required by the Due Process Clause when the application of a new law, that affects existing, open-ended entitlements, requires individual factual determinations to determine the precise impact on individual cases.

Similar issues would arise in the GPA (or Food Stamp) program only if the government were to apply a new law with more restrictive eligibility requirements *prior* to the expiration of the certification period. Before expiration of the period, the recipient has a property interest that is affected by application of the new law. By contrast, application of a new eligibility requirement *after* the certification period ends, while the applicant is attempting to qualify for a new certification period, does not affect a property right or interest.

In this case, and in the Food Stamp cases, the recipients claimed to be eligible following the expiration of the durational limit on their entitlements. No property interest is affected in such a scheme by enactment of a new law that conditions eligibility for the next certification period on proof of compliance with new criteria.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,

Petitioners,

v.

MARION BARRY, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF AMICI CURIAE FOR CHILD WELFARE LEAGUE OF AMERICA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus curiae Child Welfare League of America (CWLA) is a 76-year-old national association of almost 900 public and private nonprofit agencies across the country that are devoted to improving life for abused, neglected, and otherwise vulnerable children and families. Its member agencies provide a wide range of services, including child protective services, kinship care and family foster care, adoption, residential group care,

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[1] This brief is being filed with the written consent of the parties pursuant to this Court's Rule 37.3. Letters of consent are being simultaneously filed with the Clerk of the Court.

child day care, family preservation, mental health care, and programs for pregnant and parenting teenagers. CWLA recognizes the fundamental connection between poverty and child abuse. It advocates for policies and programs that strengthen and support families, and it works to preserve basic protections for this country's most vulnerable children. CWLA and others jointly filed a brief *amici curiae* in *A. St. P. C.* v. *B. C.*, 115 S. Ct. 2291 (1995).

Amicus curiae Disability Rights Education and Defense Fund, Inc. (DREDF) is a national law and policy center dedicated to securing equal citizenship for Americans with Disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote full integration of citizens with disabilities into the American mainstream, DREDF has represented and assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.[2] DREDF is nationally recognized for its expertise in the interpretation of disability civil rights laws.

Amicus curiae National Law Center on Homelessness & Poverty is a not-for-profit organization established to address issues relating to homelessness and poverty at the national level. It provides information, assistance, and counsel concerning constitutional and other legal

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[2] DREDF has filed briefs *amicus curiae* in this Court in numerous cases, including *Lane* v. *Pena*, 116 S. Ct. 2092 (1996); *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Honig* v. *Doe*, 484 U.S. 305 (1988); *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987); *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985); and *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984).

rights of poor and homeless people to groups throughout the country, including legislatures. The National Law Center on Homelessness & Poverty works to protect the rights of poor and homeless people, who frequently are without effective political voice or power, and to ensure that the laws are not selectively enforced against them. It has extensive experience with federal constitutional issues affecting homeless people. The National Law Center on Homelessness & Poverty and others jointly filed a brief *amici curiae* in *Rust* v. *Sullivan*, 500 U.S. 173 (1991).

Amicus curiae National Senior Citizens Law Center is a key resource for lawyers, advocates and national, state and local officials working on a wide range of issues affecting the elderly. It researches, analyzes and publishes timely reports and materials about aging issues, and works with a nationwide network of advocates and lawyers to provide quality advice and service to older Americans and all low income individuals. Rather than limit itself to traditional legal work, the National Senior Citizens Law Center has developed expertise in the operations of complicated public programs affecting the poor. The National Senior Citizens Law Center represented a party appearing as *amicus curiae* in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990).

ARGUMENT

THE ISSUE IN THIS CASE IS VITALLY IMPORTANT TO MILLIONS OF NEEDY CITIZENS CURRENTLY RECEIVING WELFARE BENEFITS

The question presented in this case is whether a person previously determined to be qualified for welfare benefits may have those benefits terminated without notice or the opportunity for a pretermination hearing when the reason the government offers for the termination is that the benefits recipient does not satisfy newly enacted eligibility criteria. Put another way, the question is whether *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), guaranteed welfare recipients a right to show that they meet changed eligibility standards before their benefits are cut off. Because "the issue is significant and likely to recur," the petition for certiorari should be granted. *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991).

The issue in this case is enormously important because it significantly affects the lives of the tens of millions of American citizens who receive welfare benefits. The significance of these benefits to those who receive them hardly needs explanation. In *Goldberg* this Court observed that "[f]or qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care." 397 U.S. at 264. Indeed, it provides "the very means by which to live." *Id.* Furthermore, the people who receive these benefits are our needy, our children, our disabled workers, our elderly—in other words, our must vulnerable citizens.

The significance of the legal issue is demonstrated in no small part by the sheer numbers of people who rely on public benefits in this the richest nation on earth. In 1993, an average of 14% of Americans—approximately 36 million people—participated in one or more of the major means-tested assistance programs during a given

month. Census Bureau, *Who Gets Assistance?*, Current Population Report P70-58, July 1996, at 1.[3] That same year, some type of means-tested assistance was received each month by an average of 12% of senior citizens (31 million people), 23.7% of children under age 18 (61 million people), 25.2% of people with a work disability (65 million people), and 57.3% of the poor (148 million people). *Id.* at 3-4. As organizations dedicated specifically to defending the rights and bettering the lives of such Americans, *amici* can attest to the vital importance of these benefits to those who qualify for them and, therefore, the importance of this case.

The reason why this case arose, and why similar cases can be expected to arise again and again, is the national movement to cutback welfare. In recent years, government at all levels, spurred by the strong public sentiment to "end welfare as we know it," has enacted legislation imposing new work requirements, reducing benefits, and restricting eligibility. *See, e.g.*, Peter T. Kilborn, *Welfare All Over the Map*, N.Y. Times, Dec. 8, 1996, at E3 (surveying state welfare programs and noting that "the policies of nearly all states have been headed in the same direction: tougher"). The aspect of welfare change that is relevant here—the modification of eligibility standards—has been adopted by many jurisdictions. *See* Urban Institute, Assessing the New Federalism: State General Assistance Programs 1996, Oct. 1996, at 6-2 & Table 6.1 (reporting that since 1992 eleven states, Arizona, California, Connecticut, Florida, Hawaii, Michigan, Minnesota, Ohio, Oregon, Pennsylvania, and Rhode Island, restricted or altered the eligibility criteria

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[3] The Census Bureau's figures are based on participation in the following programs: Aid to Families With Dependent Children, General Assistance, food stamps, Supplemental Security Income, Medicaid, and housing assistance.

for welfare benefits).[4] And, as in this case, states often terminate the benefits of persons previously receiving assistance on the basis of new criteria without providing pretermination hearings. *See* John Bouman, *Due Process for Welfare Recipients Subject to Changing Program Rules*, Clearinghouse Review, June 1996, at 109 (noting that "[p]rogram cutbacks of this type have been common in recent years" and discussing *Youakim* v. *McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2571 (1996), described in the petition at 17-18).

In 1996, Congress enacted sweeping welfare law. *See* Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). A major—indeed, historic—change effected by the law is the replacement of the Aid to Families With Dependent Children program with the funding through block grants of state assistance programs. The inevitable effect of this delegation of power to the states will be the adoption of stricter eligibility criteria and therefore more disputes such as this one. *See* Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 Harv. L. Rev. 1984 (1996) (using economic theory to explain why shifting welfare from the federal government to the states will spark a "race to the bottom" in which states will cut benefit levels and restrict eligibility criteria to avoid attracting benefits seekers from neighboring states); *see also* Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 Am. U. L. Rev. 1111, 1129 (1996) (predicting that because of the abolition of a federal entitlement to welfare "recipients are likely to see their benefits cut drastically, and the requirements for eligibility tightened").

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[4] The District of Columbia law at issue in this case took effect in 1991. *See* Pet. 3-4.

It is worth underscoring that this case raises no issue concerning either the wisdom or the lawfulness of welfare cutbacks themselves. This case does not challenge the government's prerogative to impose stricter eligibility standards on welfare recipients. Rather, the issue here is whether, once such standards have been tightened, persons who have previously qualified for benefits may be deprived of "the very means by which to live" without first being provided adequate notice and a fair chance to prove that they satisfy these new standards. Because it is not the object of any attempted change of welfare to deny benefits to persons qualified to receive them, vindication of the right petitioners assert is not antagonistic to the goal of substantive welfare change.

* * *

Goldberg v. *Kelly* has been recognized as one of the most important constitutional decisions to emanate from this Court during this century. *See* Symposium, *The Legacy of* Goldberg *v.* Kelly*: A Twenty Year Perspective*, 56 Brook. L. Rev. 729 (1990). The reason is clear. *Goldberg* involved a fundamental constitutional right—due process—in a setting where that right had enormous practical and human consequences. In this case, the Court is called upon to repudiate the erosion of *Goldberg* countenanced by the court of appeals.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition should be granted.

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No. 96-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,

Petitioners,

v.

MARION BARRY, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONERS

Goldberg v. *Kelly*, 397 U.S. 254 (1970), established that a person receiving welfare benefits may not have his benefits terminated on the ground that he no longer qualifies for them without first being afforded due process—*i.e.*, adequate notice of the proposed termination and the opportunity for a hearing at which he can attempt to show his continuing eligibility. Here, the Court of Appeals held, and respondents contend, that petitioners, who had been receiving GPA benefits from the District of Columbia, were not entitled to due process when the District cut off their benefits, because D.C. law limited their right to benefits to a "certification period" so that their "property" interest in the receipt of the benefits expired at the end of the period.

The court below and respondents have either misunderstood or ignored the square holding of *Goldberg*. Under D.C. law, petitioners were entitled to continue receiving benefits *after* their certification periods ended

so long as they continued to meet the applicable eligibility criteria. For that reason, they had a property interest in the continued receipt of benefits cognizable under the Due Process Clause. The Court of Appeals' judgment to the contrary conflicts with this Court's precedents, conflicts with numerous other lower court precedents, and raises an important issue meriting this Court's attention. Certiorari should therefore be granted.

1. Respondents initially "question" whether the petition should be granted since, in their view, petitioners' framing of the question presented "ignore[s] the principal rationale of the Court of Appeals." Br. in Opp. 9. In this, respondents are simply wrong. The question presented in the petition—whether persons receiving GPA benefits are entitled to adequate notice and the opportunity for a pretermination hearing when they are determined to be ineligible for benefits on the basis of an application of a change in the benefits eligibility criteria (Pet. i)—is the central issue in this case.

In the court below, petitioners argued that they were entitled to due process because they had been receiving benefits under statutory standards defining eligibility for those benefits and because D.C. law provided that the benefits would continue so long as they continued to meet the conditions of eligibility, whatever those conditions might be. *See* Pet. App. 10a (reproducing part of petitioners' brief). In response to this, the Court of Appeals said that "[w]hat this argument overlooks is that, after June 30, 1991 [the day before D.C. Law 9-27 took effect], the members of the plaintiff class did *not* meet the medical eligibility standard. It had been changed." *Id.* Thus, the court below held that petitioners lacked a due process right because the District changed the criteria for eligibility in its GPA program. The question presented fully captures that question. To the extent that the Court of Appeals rested its decision on the erroneous notion, *see infra* at 3-4, that petitioners

had no property interest in receiving benefits due to the District's use of certification periods, whether petitioners had such an interest is a subsidiary issue encompassed by the question presented.

2. Respondents, adopting the rationale of the Court of Appeals, argue that the termination of petitioners' benefits without due process comports with this Court's cases because petitioners had no property interest in receiving benefits. The reason for that, they say, is that D.C. Law 9-27 limited any such interest petitioners had in obtaining benefits to the duration of their certification periods. Br. in Opp. 10. But again, respondents, like the court below, have fundamentally misunderstood the governing law in this area. Petitioners had a property interest in the continued receipt of benefits because *under D.C. Law 9-27 they were entitled to continue to receive benefits so long as they continued to meet the eligibility criteria.*

As this Court made clear in *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972), "a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U.S. 254." Significantly, this property interest vests in benefits recipients even though they have not yet established their actual eligibility for future benefits. Thus, the recipients in *Goldberg*—who, like petitioners, were subject to periodic reviews of their eligibility, *see Goldberg*, 397 U.S. at 258—"had not yet shown that they were, in fact, within the statutory terms of eligibility. But [this Court] held that they had a right to a hearing at which they might attempt to do so." *Roth*, 408 U.S. at 577.

Under *Goldberg*, then, it does not matter that D.C. law provided for the potential cessation of benefits at the end

of a given certification period. What matters is that the law provided for the continuation of benefits past that certification period so long as eligibility continued. Since the end of a certification period did not necessarily mean that benefits would end, but only that continuing eligibility had to be periodically reassessed, the District's use of certification periods did not undo recipients' expectations that they would continue to receive benefits so long as they continued to meet eligibility standards. Rather, certification periods are merely a procedural device for facilitating continuing-eligibility determinations. And as this Court has said, "'[p]roperty' [as used in the Fifth Amendment] cannot be defined by the procedures provided for its deprivation." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985).

The effect of the ruling of the court below, defended here by respondents, is to make *Goldberg* meaningless. Under their approach, a governmental provider of benefits can circumvent *Goldberg* by simply declaring that the recipient is being given the benefit for a fixed term (say, a "certification period"), no matter how brief, following which he may reapply for additional benefits but, if he is deemed ineligible on the basis of the paper record, he will have no right to notice or a hearing before his benefits are cut off. Such a scheme makes a mockery of *Goldberg*'s admonition that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process * * *. [T]he crucial factor in this context * * * is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264.

Respondents argue that petitioners' approach unduly "limit[s] the power of the legislature" in designing benefits programs. Br. in Opp. 12. But that is not so. Legislatures are free under petitioners' approach to

impose absolute time limitations upon the right to receive benefits. For example, a legislature could certainly provide that benefits will be supplied for a maximum of two years, following which no more benefits can be received. And under this Court's cases, the constitutional requirement of procedural due process would not call into question the legality of such programs.[1] Thus, in *Roth*, a professor with a one-year contract of employment had no property interest in retaining his job at the end of the year because there were "no statutory or administrative standards defining eligibility for re-employment." *Roth*, 408 U.S. at 566-567. The requirements of due process do apply, however, if a legislature provides, as the District indisputably did in this case, that benefits shall continue so long as eligibility continues. In such a case, *Goldberg* holds that recipients are entitled to adequate notice and the opportunity for a pretermination hearing.

Finally, even if D.C. Law 9-27, by its terms, did not create a property interest in GPA recipients in the continued receipt of benefits, the District's implementation of the law surely did, as explained in the petition. *See* Pet. 5-6, 15 (citing *Perry* v. *Sindermann*, 408 U.S. 593 (1972)). Specifically, by employing the exact same procedures and using the exact same forms in administering the new law as it did with respect to the old law, and by failing to advise either GPA recipients or their doctors of the change in the law, the District created on the part of GPA recipients a reasonable expectation that if they continued to be disabled they would continue to

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[1] In this vein, Section 103(a) of the Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), provides that, with certain exceptions, a State may not provide assistance to a family that includes an adult who has received assistance for more than 60 months (consecutively or not) under a program funded at least in part by federal block grants.

receive benefits. Respondents make no argument to the contrary and fail even to cite *Perry*.

3. Respondents contend that during oral argument in the court below petitioners conceded that the District could, in theory, have limited entitlement to GPA benefits to a fixed period and therefore, they say, the question in this case involves nothing more than the construction of D.C. law—*i.e.*, whether the District in fact created a "durationally limited" entitlement. Br. in Opp. 14. This is a complete red herring.

It is true, as the Court of Appeals noted, that petitioners acknowledged below that "the [D.C.] Council *could* have limited a recipient's entitlement to GPA benefits to a concrete, finite span of time." Pet. App. 9a-10a. But respondents fail to note what the Court of Appeals acknowledged in the same breath—that petitioners added "that the 1991 legislation, under which they contend their property interest is derived, contained no such limitation." *Id.* at 10a. The central point is that there is no dispute in this case about what D.C. Law 9-27 says. That law provides that a GPA recipient's benefits shall be terminated at the end of his certification period unless he reapplies and is found to be eligible for additional benefits under the new eligibility criteria; a recipient who does not meet the new criteria after his certification period ends has no right under the statute to notice or the opportunity for a hearing prior to the termination of benefits. Again, none of this is in dispute. The question here is whether, given this statutory scheme, petitioners had a right to due process. That is the federal constitutional issue presented in this case and it warrants this Court's review.

4. Respondents argue that this Court should deny the petition because of Congress' adoption of the Personal Responsibility and Work Reconciliation Act of 1996. Br. in Opp. 16. In fact, as noted in the petition, Pet. 25,

and in the brief *amici curiae* filed in this case,[2] the 1996 Act actually increases the importance of this case because it shifts responsibility from the federal government to the States for providing welfare benefits and ensures that the issue in this case will arise again and again. As stated in the petition, there is already considerable conflict among the lower courts on the issue in this case. Pet. 15-24; *infra* 7-10. The 1996 Act makes that issue even more important because it requires all States accepting federal block grants to submit a plan indicating how they will implement the right to a hearing under their benefits programs. Pet. 25 n.12. Thus, resolution of the important question presented in this case will help States comply with one of the mandates of the 1996 Act.

5. Finally, respondents state that there is no conflict between the decision below and the numerous decisions cited in the petition. Yet their basis for so stating depends upon acceptance of their contested view of the very issue that is in dispute in this case. Citing only two of the many cases on which petitioners rely (*Youakim* v. *McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2571 (1996), and *Greene* v. *Babbitt*, 64 F.3d 1266 (9th Cir. 1995)), respondents assert that those cases are "distinguishable" from the case at hand because "the programs involved in those cases had open-ended entitlements, as opposed to programs where legislatures have placed durational limits on entitlements." Br. in Opp. 17. This simply repeats respondents' misunderstanding of the issue in this case. As discussed above, petitioners' argument is that it is irrelevant that the District used certification periods; petitioners had a right to due process because D.C. law permitted them to continue to receive benefits so long as

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[2] Brief *Amici Curiae* for Child Welfare League of America, Disability Rights Education and Defense Fund, Inc., National Law Center on Homelessness & Poverty, and National Senior Citizens Law Center in Support of Petitioners 6.

they remained eligible for them. Thus, respondents' attempt to deny the existence of a conflict in the lower courts assumes the correctness of their legal position. *Greene* and *Youakim* do, in fact, conflict with the decision below because in each, as here, there was a change in benefits eligibility criteria, and because in each, unlike here, the court rejected the argument that the benefits recipients lacked a property interest on account of the change. *See* Pet. 16-18 (discussing these cases).

Furthermore, respondents do not make any attempt to address the many other conflicting cases petitioners cited in the petition for certiorari, some of which plainly conflict with the decision below and clearly did not involve "open-ended entitlements." Br. in Opp. 17. As noted in the petition, four circuit courts have held that when in the early 1970's various federally-funded state disability programs were replaced with the federal SSI program, those who had been receiving benefits under the state programs had a property interest in the continued receipt of benefits under the federal program, and so were entitled to a hearing before they could be denied SSI benefits. *See* Pet. 19-20 (discussing *Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Brown* v. *Weinberger*, 529 F.2d 514 (4th Cir. 1975); and *Ryan* v. *Shea*, 525 F.2d 268 (10th Cir. 1975)). In other words, these courts held that when one benefits program ended and another began, the recipients of benefits under the old program had a property interest in receiving benefits under the new one. That is also this case. Hence, there is simply no merit to respondents' claim that none of the cases petitioners cite is like this one.

Respondents, like the Court of Appeals, argue that when petitioners' certification periods expired following the enactment of D.C. Law 9-27, they stood "under the statute in virtually the same posture as a first-time applicant." Br. in Opp. 17. *Accord* Pet. App. 15a.

Even if that were true (which it is not), there would still be a serious conflict on the question whether petitioners had a property interest. As explained in the petition, all of the federal courts of appeals to have considered the question are in agreement that an applicant for welfare benefits, no less than a current recipient, has a property interest protected by the Due Process Clause. *See* Pet. 21-22 (discussing *Mallette* v. *Arlington County Employees' Supp. Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996)).[3]

All told, the court below offered three reasons for its conclusion that petitioners had no property interest in receiving benefits. The court said petitioners lacked such an interest because (1) they did not meet the new eligibility standards (Pet. App. 10a); (2) their certification periods ended (*id.* at 4a); and (3) they were like first-time applicants for benefits (*id.* at 15a). Each of these propositions conflicts with several federal circuit court cases, as the petition explained (*see* Pet. 16-22) and as the following chart reflects:

proposition	*conflicts with*
(1) not meet new standards	*Greene, Youakim* & *Mallette*
(2) certification periods ended	*Tatum, Johnson, Brown* & *Ryan*
(3) like first-time applicants	*Mallette* & cases cited therein

[3] The Fourth Circuit said in *Mallette*:

> As explained in *Roth*, the Supreme Court's due process jurisprudence focuses on whether statutory provisions create a right, not whether benefits have been received in the past. 408 U.S. at 577. The Arlington Retirement System creates in its members a legitimate expectation of receiving benefits and a consequent right to be heard. Eligible applicants are no less entitled to that expectation than are eligible recipients, and the potential consequences of denying disability benefits are no less potentially dire than those of revoking them. [91 F.3d at 640.]

Because the issue in this case was decided below in a way that squarely conflicts with this Court's due process precedents and the decisions of many other federal appellate and state supreme courts; is extremely important to the millions of Americans who receive public assistance; and is sure to bedevil the lower courts for years to come as the welfare reform movement takes hold, the exercise of this Court's certiorari power is appropriate.

* * *

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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